(1)

No. 03 813 DEC 3 2003

In The
Supreme Court of the United States

GREGG SMITH, *et al.*,

Petitioners,

v.

BOARD OF TRUSTEES OF LOUISIANA STATE EMPLOYEES' RETIREMENT SYSTEM,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Louisiana

PETITION FOR A WRIT OF CERTIORARI

PAUL R. BAIER
4222 Hyacinth Street
Baton Rouge, Louisiana 70808
(225) 344-9815

CELIA R. CANGELOSI
918 Government Street, Suite 101
Baton Rouge, Louisiana 70821
(225) 387-0511
Counsel of Record

SHERI M. MORRIS
SHOWS, CALI & BERTHELOT, L.L.P.
644 St. Ferdinand Street
Baton Rouge, Louisiana 70802
(225) 346-1461

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QUESTIONS PRESENTED

1. Whether *Pennie v. Reis*, 132 U.S. 464, 471 (1889), which holds a public employee's promised death benefit is "a mere expectancy created by the law, and liable to be revoked or destroyed by the same authority" should be overruled as inconsistent with today's marketplace of public employment and with this Court's modern Contracts Clause analysis?

2. Whether La. R.S. 11:416.1, which retroactively repealed retirement benefits promised petitioners by enactment of Act 455 (2001) and upon which petitioners relied in retiring and accepting reemployment with the State, violates the Contracts Clause of the United States Constitution?

PARTIES

Gregg Smith and the petitioners listed at App. 70-71 are employees of the Louisiana Department of Public Safety and Corrections and members of the Louisiana State Employees' Retirement System. Petitioners retired under the provisions of Act 455 (2001) and were rehired by the Louisiana Department of Public Safety and Corrections.

Respondent, Board of Trustees of Louisiana State Employees' Retirement System, is the state board responsible for the management of the Louisiana State Employees' Retirement System ("LASERS").

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Gregg Smith, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana entered in this matter on June 27, 2003.

OPINIONS BELOW

The June 27, 2003 opinion of the Supreme Court of Louisiana is reported at 851 So. 2d 1100 and is reprinted herein, App. 1. A timely filed petition for rehearing was denied by the Supreme Court of Louisiana on September 5, 2003, App. 42. The trial court's oral reasons for judgment holding La. R.S. 11:416.1 unconstitutional under Art. I, § 10 of the United States Constitution were rendered on June 26, 2002, App. 41. The trial court's judgment declaring La. R.S. 11:416.1 unconstitutional and permanently enjoining its enforcement was signed on July 1, 2002, App. 43.

JURISDICTION

The judgment of the Supreme Court of Louisiana sought to be reviewed was entered on June 27, 2003. A timely filed petition for rehearing was denied by the Supreme Court of Louisiana on September 5, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Art. I, § 10

"No State shall . . . pass any . . . Law impairing the Obligation of Contracts, . . ."

La. Const., Art. X, § 29(B)

"Membership in any retirement system of the state or of a political subdivision thereof shall be a contractual relationship between employee and employer, and the state shall guarantee benefits payable to a member of a state retirement system or retiree or to his lawful beneficiary."

La. Const., Art. X, § 29(E)(5)

"The accrued benefits of members of any state or statewide public retirement system shall not be diminished or impaired. Future benefit provisions of the state and statewide public retirement systems shall only be altered by legislative enactment."

STATUTORY PROVISIONS INVOLVED

La. R.S. 11:416, as amended by Act 455 (2001), appears herein, App. 54.

La. R.S. 11:416, as amended by Act 165 (1st E.S. 2002), appears herein, App. 65.

La. R.S. 11:416.1, enacted by Act 165 (1st E.S. 2002), appears herein, App. 69.

STATEMENT OF THE CASE

1. Petitioners Gregg Smith, *et al.*, retired from their public employment with the Louisiana Department of Public Safety and Corrections under the provisions of Act 455 (2001), effective June 30, 2001, which authorized state employees eligible for retirement to retire and to be reemployed and regain membership in the Louisiana State Employees' Retirement System ("LASERS") on condition that their retirement benefits would be suspended for twelve months. Thereafter, they would receive their full earned retirement benefits, their reemployment salary, and a supplemental retirement benefit after thirty-six months of reemployment computed on the basis of their length of service and salary during reemployment.

2. Effective May 9, 2002, the Louisiana Legislature, by Act 165 (1st E.S. 2002) repealed the Act 455 benefit provisions and reinstated the law as it existed prior to Act 455. In repealing Act 455, the Legislature enacted La. R.S. 11:416.1, which applies specifically to the retirees who had retired and been rehired during the 10-month interim period under Act 455 and which retroactively repeals the benefits afforded by Act 455. Claiming a violation of the Contracts Clause of the United States Constitution, Art. I, § 10, petitioners sued in state court for declaratory and injunctive relief. The federal constitutional claim was expressly recited as a ground for relief in their petition filed in state court, at Paragraph 20. On May 28, 2002, the trial court issued a temporary restraining order enjoining

LASERS from implementing La. R.S. 11:416.1 as to petitioners. Trial on the request for declaratory and permanent injunctive relief was had on June 12, 2002. On June 26, 2002, in its oral reasons for judgment the trial court held that La. R.S. 11:416.1 as enacted by Act 165 was violative of Art. I, § 10 of the United States Constitution. The trial court judgment was signed July 1, 2002.

3. The Louisiana Supreme Court, finding no violation of the Contracts Clause of the United States Constitution,[1] reversed the trial court by a vote of 5-2. The majority reasoned that petitioners' rights to the "reemployment benefits" offered in Act 455 had neither "vested" nor "accrued" until they had been reemployed for twelve months. App. 11-12. "Similarly, their rights to receive an additional supplemental benefit along with their salaries and retirement benefits did not 'vest' nor 'accrue' until they had been reemployed for thirty-six months." App. 12. Agreeing with LASERS, the majority held, "because the law was changed prior to the time plaintiffs fulfilled the twelve month waiting period or were reemployed for thirty-six months, the law does not operate retroactively, nor does it diminish or impair their rights." App. 12. According to the majority, "the benefits offered by La. R.S. 11:416 are not retirement benefits, but reemployment benefits. Although these reemployment benefits include the right to certain retirement benefits along with a salary

[1] The Original Brief of Plaintiffs/Appellees, Gregg Smith, *et al.*, filed in Louisiana Supreme Court, p. 11, expressly raised the federal Contracts Clause claim sought to be reviewed here: "**IV. Act 165 (1st E.S. 2002) violates the Contracts Clauses of the Louisiana and United States Constitutions**" (emphasis in original).

after reemployment for a certain period of time, they do not begin to accrue until a retiree becomes reemployed." App. 13. Applying *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400 (1983), the majority concluded: "As we have found that plaintiffs have not met their burden under part one of the Contract Clause analysis that the statute impaired a contractual obligation, our Contract Clause analysis is at an end." App. 19.

4. Justice Knoll, joined by Justice Weimer, dissented: "I find the majority's views are unfortunately reminiscent of the 'gratuity approach,' whereby pensions are considered to be 'gifts' from the state and errs in several respects." App. 21. Justice Knoll reasoned:

> The majority first errs in characterizing the benefits afforded under Act 455 as "reemployment benefits." In my opinion, these benefits are clearly retirement benefits as Act 455 restored membership in LASERS by requiring the remittance of both employer and employee contributions to LASERS based on the rate that applied to the retiree's position on the date of his reemployment. In addition, Act 455 permitted an employee's retirement allowance to be supplemented by an amount attributable to the service that occurred during reemployment and the average compensation calculated for the period of such employment. Indeed, the first sentence of La. R.S. 11:416.1 begins "a retiree who *retired under the provisions of Act No. 455* of the 2001 Regular Session" and later continues "any person who *retired under the provision of Act No. 455* of the 2001 Regular Session of the Legislature." (emphasis added).

> What is more troubling to me, however, is the majority's treatment of Article X, Section 29(B). The majority announces that Article X, Section 29(B) "serves to expressly recognize the existence of a contract between the state and the employee as to those retirement benefits that *vested*." (emphasis added). This statement confuses the relevant differences between "vesting" and "contractual" protection. As one court has properly recognized, "'vesting' and 'contractual' are not synonymous." *National Education Association-Rhode Island v. Retirement Board of the Rhode Island Employees' Retirement System*, 172 F.3d 22 (1st Cir. 1999).
>
> > '[V]esting' refers to the period provided by a plan for which an employee must work to become eligible for a pension if and when he attains retirement age. . . . *Whether a plan affords contractual protection against a change in its terms is a different question.* A plan may not protect "vested" employees against change, or alternatively may provide some contractual protection even for unvested employees.
>
> *Id.* at 28 (emphasis added).
>
> Our constitution conclusively answers this question by expressly stating that membership in LASERS "shall be a contractual relationship."

App. 21-23 (footnotes omitted). According to Justice Knoll and Justice Weimer, App. 26,

> plaintiffs reasonably relied upon the substantial increase in benefits afforded under Act 455 in deciding whether to retire from public service.

> Nevertheless, the legislature, for no other reason than to correct its own financial miscalculations, enacted La. R.S. 11:416.1 which retroactively divested these benefits less than a year after they were first offered. Even further, La. R.S. 11:416.1 was directed to a finite group of reemployed retirees whose continued receipt of the benefits under Act 455 did not threaten the actuarial soundness of the retirement system.

Quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 n.15 (1978), Justice Knoll insisted that, "[i]mpairments of a state's own contracts 'face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties.'" App. 26. Contrary to the majority, the dissent found substantial impairment: "Plaintiffs' compensatory time (or 'K-time'), however, is *gone for good.*" (emphasis Justice Knoll's) App. 28. "[T]he majority misses the point because both plaintiffs who testified at trial explained that they would *not* have retired had Act 455 not been in effect." (emphasis Justice Knoll's) App. 29.

> Thus, by retiring in order to obtain the benefits offered under Act 455, plaintiffs passed up the opportunity to *use* their accumulated K-time. Indeed, this is no small consequence, as Shannon Templet, Human Resources Manager for the Department of Public Safety and Corrections, testified that a combined total of over 11,800 hours of compensatory time was lost among the 161 plaintiffs. Accordingly, I agree that "at the very least, where the contract right or obligation impaired was one that *induced* the parties to enter into the contract and upon the continued existence of which they have *especially relied*, the impairment must be considered 'substantial' for

> purposes of the Contract Clause." *Baltimore Teachers Union v. Mayor of Baltimore*, 6 F.3d 1012, 1016 (emphasis added). *See also Christensen v. Minneapolis Municipal Employees Retirement Bd.*, 331 N.W.2d 740, 749 (Minn. 1983) ("In the realities of the modern employment marketplace, the state reasonably expects its promise of a retirement program to induce persons to accept and remain in public employment, and persons are so induced, and injustice can be avoided only by enforcement of that promise"); . . .

App. 31. Justice Knoll's dissent acknowledges that "because Act 455 had the potential to threaten the actuarial soundness of LASERS, I have no trouble finding that the legislature reacted reasonably in reinstating the original three irrevocable options for reemployed retirees." App. 33. However, said Justice Knoll,

> the legislature did not stop there. Instead of simply preventing *future* retirees from draining the system, the legislature went one step further by enacting La. R.S. 11:416.1 to retroactively alter the benefits of those state employees who had retired and been reemployed during the few months Act 455 was in effect. I agree with the courts that have held where an enactment appears to be "tailored to modify a particular contractual obligation, rather than to be part of a broad public program which incidentally has the effects of impairing the particular contract," it cannot be deemed to have been reasonable to serve the governmental goal. *United Firefighters of Los Angeles City v. City of Los Angeles*, 210 Cal.App.3d 1095, 1115, 259 Cal.Rptr. 65 (1989) (citing *Continental Ill. Nat. Bank v. State of Washington*, 696 F.2d 692, 702 (9th Cir. 1983)).
>
> Nevertheless, even assuming that the enactment of La. R.S. 11:416.1 was reasonable, the

> enactment of La. R.S. 11:416.1 was clearly unnecessary. . . . As declared by the United States Supreme Court, "[a] State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." *United States Trust Company*, 97 S.Ct. at 1527. Thus, I note with significance that counsel for LASERS conceded at oral arguments that the continued receipt by these 161 plaintiffs of Act 455's benefits, while costly, did not threaten the actuarial soundness of the retirement system. *See Halpin*, 329 N.W.2d at 915 ("That the maintenance of a retirement plan is heavily burdening a governmental unit has not itself been permitted to serve as justification for a scaling down of benefits figuring in the contract. . . . "); *Andrews*, 931 F.Supp. at 1266 ("Although I have no doubt that maintaining the 'actuarial soundness' of the [County Retirement Plan for Appointed and Elected Officials] is an important purpose, the County has failed to make a sufficient showing that the means which it adopted to address its 'problem' is the lease drastic available."). Under these circumstances, I readily find that the enactment of La. R.S. 11:416.1 was neither reasonable nor necessary to rectify the problems created by the legislature's own financial miscalculations.

App. 33-35. (footnote omitted). "In my opinion, it is one matter to adjust employees' retirement packages years before they retire—it is quite another matter to retroactively withdraw the benefits reasonably relied upon by state employees in making life impacting decisions." App. 32, n.6. Justice Knoll's dissent concludes, App. 37:

> [S]tate supreme courts have moved away from the "gratuity approach" and have begun to protect the expectations of pension plan members.

See Andrew Mackenzie, *Spiller v. State: Determining the Nature of Public Employees' Rights to Their Pensions*, 46 Me. L. Rev. 355, 358 (1994). As one commentator explains:

> Many states have fully rejected the gratuity theory as outdated. Most of those states now use some form of a *contract theory* to enforce the rights of public employees to their pensions. . . .

Id. at 359 (emphasis added). In my view, this case presents a classical situation for a traditional contract clause analysis, especially in light of the fact that our constitution now expressly designates membership in LASERS to be a "contractual relationship."

REASONS FOR GRANTING THE WRIT

1. The majority opinion of the Supreme Court of Louisiana rests upon the same formalism—"vested", "accrued"—that led this Court a hundred years ago to deny a legitimate expectancy of death benefits to a policeman's estate. *Pennie v. Reis*, 132 U.S. 464 (1889), may be a dead letter of the law, but its formal burial is overdue.[2]

[2] See, *e.g.*, Deborah Kemp, *Public Pension Plans: The Need for Federal Regulation*, 10 Hamline L. Rev. 27, 35-36 (1987) (calling for *Pennie v. Reis* to be overruled); Note, *Public Employee Pensions in Times of Fiscal Distress*, 90 Harv. L. Rev. 992, 994 (1977) (noting that *Pennie v. Reis* has been "justifiably" criticized); Rubin G. Cohn, *Public Employee Retirement Plans—The Nature of the Employees' Rights*, 1968 U. Ill. L. Rev. 32, 35 (1968) (observing that *Pennie v. Reis* is "logically and analytically disquieting").

While not a Contracts Clause case, *Pennie v. Reis'* formalism certainly is apparent in the reasoning of the majority opinion below, as Justice Knoll's dissent points out. In the context of the Contracts Clause claim raised here, this Court has an ideal opportunity to overrule *Pennie v. Reis* and bring the conflicting law of bargained for retirement benefits in line with this Court's modern Contracts Clause analysis.

2. The majority's legal conclusion that "the benefits offered by La. R.S. 11:416 are not retirement benefits, but reemployment benefits", App. 13, is contradicted by the plain language of the statute, which in its title speaks of "reemployment of retirees, including but not limited to *the benefits payable to such retirees*," (emphasis added), App. 47. Again, the same formalism of *Pennie v. Reis* is evident in the majority's convenient avoidance of the express language of Louisiana's Constitution, Art. X, § 29(B) ("Membership in any retirement system of the state or of a political subdivision thereof shall be a contractual relationship between employee and employer," App. 45)—as though a rose by any other name would prove less thorny. But this Court has made it clear that whether a contractual relationship exists in the first instance within the meaning of the Contracts Clause is a federal constitutional question to be decided ultimately by this Court. *General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992), *viz.*:—

> We "accord respectful consideration and great weight to the views of the State's highest court," though ultimately we are "bound to decide for

> ourselves whether a contract was made." *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 100 (1938). The question whether a contract was made is a federal question for purposes of the Contract Clause analysis, see *Irving Trust Co.* v. *Day*, 314 U.S. 556, 561 (1942), and "whether it turns on issues of general or purely local law, we can not surrender the duty to exercise our own judgment." *Appleby* v. *City of New York*, 271 U.S. 364, 380 (1926).

The majority opinion of the Supreme Court of Louisiana cuts off Contracts Clause analysis too curtly and is contrary to this Court's requirement of careful analysis of the underlying state statutory law and its context. The obvious purpose of Act 455 was to keep experienced employees such as Gregg Smith (twenty-five and a half years with the Department of Public Safety and Corrections) from retiring and entering the private market.[3] Justice Knoll's dissent is faithful to this Court's Contracts Clause analysis and is worthy of approval by this Court on the important question of federal constitutional law presented should this Court grant certiorari.

3. Louisiana Constitution of 1974, Article X, § 29(B), adds weight to Gregg Smith's prayer that certiorari issue

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[3] "We have such a high turnover in our department of employees. It's an inducement to try to keep employees in our department." Testimony of Gregg Smith, June 12, 2002, Hearing on the Merits, No. 495,705, 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana, p. 21; Record on Appeal, p. 99.

herein.[4] Louisiana's organic law expressly states that petitioners' continuing membership in LASERS under Act 455 "shall be a contractual relationship between employee and employer," App. 47. Thus, what this Court has termed the "unmistakability doctrine" as to the threshold requirement for the recognition of public contracts subject to the federal Contracts Clause constraints is satisfied. *United States v. Winstar*, 518 U.S. 839, 871, 873-74 (1996). And as Justice Knoll recognized in her dissent, *Retired Professors v. Almond*, 690 A.2d 1342 (R.I. 1997), is distinguishable on the ground that Rhode Island's Constitution contains no such provision as Art. I, § 29(B). Nor does Connecticut's Constitution. Thus the decision of the Connecticut Supreme Court in *Pineman v. Oechslin*, 488 A.2d 803 (Conn. 1981), which eventually wound its way to this Court by way of *Pineman v. Fallon*, 842 F.2d 598 (2d Cir. 1988), *cert. denied*, 488 U.S. 824 (1988), is also distinguishable in this vital Contracts Clause respect.

4. Certiorari should issue herein under Supreme Court Rule 10(b) because, as was evident to Justices Knoll and Weimer, the opinion of the Louisiana Supreme Court is in conflict with at least a dozen decisions of state courts of last resort on the important federal question presented. First, there is *Birnbaum v. New York State Teachers Retirement System*, 152 N.E.2d 241 (N.Y. 1958), which is especially relevant because New York's Constitution, like

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[4] See generally, Darryl B. Simko, *Of Public Pensions, State Constitutional Contract Protection, and Fiscal Constraint*, 69 Temp. L. Rev. 1059, 1077-78 (1996) ("the [U. S.] Supreme Court's interpretation of the Contract Clause has become the definitive analysis of state constitutional jurisprudence regarding impairment.").

Louisiana's, affords constitutional protection to public employee members of its State retirement system:— "[M]embership in any pension or retirement system of the state . . . shall be a contractual relationship, the benefits of which shall not be diminished or impaired." New York Constitution, Art. V, § 7. Even before this constitutional amendment, the New York Court of Appeals afforded its public safety officers the benefit of their bargained for reliance upon a statute in effect when they retired, *viz.*:—

> We may concede an incongruity in plaintiff's drawing a pension as a retired policeman and at the same time a salary as an active policeman in a neighboring city. That, however, was a right granted or at least not denied to him under section 1560 of the charter, when he retired. We take the statute as we find it.

Roddy v. Valentine, 197 N.E. 269 (N.Y. 1935).

As to other state courts of last resort, we recite them in chronological order. Third on our Rule 10(b) list is *Bender v. Anglin*, 60 S.E.2d 756 (Ga. 1950), *cert. denied*, 340 U.S. 878 (1950). Next is Justice Musmanno's opinion for the Supreme Court of Pennsylvania in *Hickey v. Pension Board*, 106 A.2d 233, 237 (Pa. 1954):

> The Legislature may strengthen the actuarial fibers but it cannot break the bonds of contractual obligations. The permissible changes, amendments and alterations provided for by the Legislature can apply only to conditions in the future, and never to the past. According to the cardinal principle of justice and fair dealings between government and man, . . . the parties shall

> know prior to entering into a business relationship the conditions which shall govern that relationship.

Surely the retroactive repeal of Louisiana's promised benefits as an inducement to Gregg Smith and his fellows to stay on the job with the State disrupted the business relationship solemnly established by Act 455.

Again, *Yeazell v. Copins*, 402 P.2d 541 (Az. 1965) (en banc), where in a similar situation the Arizona Supreme Court held "that the right to a pension becomes vested upon acceptance of employment." *Id.*, at 545. Otherwise, said the Court, "appellant was relegated to a second-class status as if the government had a special standing to renege on the terms of employment after the contract has been entered into and part performance has taken place—a status which recognized neither moral responsibility nor legal obligation." *Id.*, at 544.

In *Opinion of the Justices*, 303 N.E.2d 320, 328 (Mass. 1973), the Supreme Judicial Court of Massachusetts analyzed the relationship of the Contracts Clause to public retirement systems with a modern judicial eye: "When, therefore, the characterization 'contract' is used, it is best understood as meaning that the retirement scheme has generated material expectations on the part of employees and those expectations should in substance be respected. Such is the content of 'contract.'" And more: "[A] retirement plan establishing a contractual relationship invites a different analysis and whether viewed strictly as contract or as property may be constitutionally guarded against impairment." *Id.*, at 329.

The Kansas Supreme Court opinion in *Singer v. City of Topeka*, 607 P.2d 467 (Kan. 1980), and again in *Brazelton v. Kansas Public Employees Retirement*, 607 P.2d 510 (Kan. 1980), are on our Rule 10(b) list. Justice Knoll in her dissent cites *Halpin v. Nebraska State Patrolmen's Retirement System*, 320 N.W.2d 910 (Neb. 1982). It, too, is in constitutional conflict with the majority opinion below. And from the Supreme Court of Wisconsin in the context of the Wisconsin Public Employees System, another view is expressed contrary to the majority opinion of the Supreme Court of Louisiana below: "This court has recognized that a contract is impaired when the consideration agreed upon is altered by legislation." *State ex rel. Cannon v. Moran*, 331 N.W.2d 369 (Wis. 1983). "We would be putting form over substance if we held that only a direct reduction in pension benefits constitutes an impairment." *Id.*, at 376. "It is understandable that the plaintiffs would rely upon the legislature's actions in making this very important decision regarding their retirement plan." *Id.*, at 377.

The Supreme Court of Minnesota, with respect to the Minneapolis Municipal Employees Retirement Plan, invoked this Court's Contracts Clause test laid down in *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400 (1983), to condemn legislative impairment of a retirement program: "In the realities of the modern employment marketplace, the state reasonably expects its promise of a retirement program to induce persons to accept and remain in public employment, and persons are so induced, and injustice can be avoided only by enforcement of that promise." *Christensen v. Minneapolis Municipal Employees Retirement Board*, 331 N.W.2d 740, 749 (Minn. 1983).

The Supreme Court of Oregon has also rendered a modern Contracts Clause opinion in the context of today's public employees' retirement systems, *Oregon State Police Officers' Association v. State*, 918 P.2d 765 (Or. 1996). Again, as Justice Knoll's dissent recognized, here is law contrary to the majority opinion in Gregg Smith's case: "Nullification of an express term of plaintiffs' PERS contract with the state is an impairment for purposes of Contract Clause analysis." *Id.*, at 776, citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 247 (1978). "The most basic purposes of the Contracts Clause, as well as the notions of fundamental fairness that transcend the clause itself, point to these simple principles: the state must keep its promises, and it may depart therefrom only for a significant and legitimate public purpose. *United States Trust Co.*, 431 U.S. at 26." *Id.*

The Supreme Court of North Carolina has likewise rendered a recent decision in conflict with the formalism and outdated Contracts Clause holding of the majority below. *Bailey v. State*, 500 S.E.2d 54 (N.C. 1998).

Finally, *Nicholas v. State*, 992 P.2d 262 (Nev. 2000) (en banc), enforces Nevada's statutory promise of quadruple retirement benefits to former Nevada legislators who retired while the quadrupling act was in effect and prior to its repeal five months later due to a vociferous public outcry. Whatever one may think of the result in *Nicholas*, it is a far cry from the plight of Gregg Smith, *et al.*, petitioners here, who rendered continued service to Louisiana's Department of Public Safety and Corrections and who continued to contribute to LASERS, all based upon their justifiable reliance upon Act 455 in making "life impacting decisions,"—as Justice Knoll recognized in her dissent below, App. 32, n.6.

Thus, a dozen decisions of other state courts of last resort conflict with the crabbed Contracts Clause decision of the Louisiana Supreme Court.

5. Fifth and finally. Justice Knoll's dissent makes clear that the decision of the Supreme Court of Louisiana is in conflict with the relevant decisions of this Court under the Contracts Clause, *viz.*, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978) ("Contracts enable individuals to order their personal and business affairs according to their particular need and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them."); *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400, 412 n.14 (1983) ("When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets."). *Cf. Perry v. United States*, 294 U.S. 330, 351 (1935) ("The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.") (per Hughes, C.J.). To which we would add *United States v. Larionoff*, 431 U.S. 864, 878 (1977), where the Government argued that since a promised bonus "had been abolished before [the promisee] became eligible to receive one, he is not entitled to receive a bonus." This Court rejected the Government's argument in a context strikingly analogous to the situation at bar. "If Congress had such an intent, serious constitutional questions would be presented." *Id.*, at 879. Those questions are unavoidably before this Court on

Gregg Smith's prayer. Under this Court's Rule 10(c), certiorari should therefore issue.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

PAUL R. BAIER
4222 Hyacinth Street
Baton Rouge, Louisiana 70808
(225) 344-9815

CELIA R. CANGELOSI
918 Government Street, Suite 101
Baton Rouge, Louisiana 70821
(225) 387-0511
Counsel of Record

SHERI M. MORRIS
SHOWS, CALI & BERTHELOT, L.L.P.
644 St. Ferdinand Street
Baton Rouge, Louisiana 70802
(225) 346-1461

December, 2003

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SUPREME COURT OF LOUISIANA

No. 2002-CA-2161

GREGG SMITH, ET AL.

VERSUS

BOARD OF TRUSTEES OF LOUISIANA STATE EMPLOYEES' RETIREMENT SYSTEM

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT, FOR THE PARISH OF EAST BATON ROUGE, THE HONORABLE JANICE CLARK, JUDGE

VICTORY, Justice

This appeal concerns the constitutionality of La. R.S. 11:416.1, which pertains to reemployment packages available to certain retired state employees. After reviewing the record and the applicable law, we reverse the judgment of the trial court and find the statute to be constitutional.

FACTS AND PROCEDURAL HISTORY

Prior to June 30, 2001, La. R.S. 11:416 offered retirees of the Louisiana State Employees Retirement System ("LASERS") the choice of three options regarding their benefits if they chose to return to state employment. Under Option 1, a reemployed retiree could continue to receive his pension benefits until he earned more than fifty percent of his annual allowance during any fiscal year. After that point, a reemployed retiree's benefits were reduced by the amount earned in excess of fifty percent. A retiree who chose Option 1 could not become a contributing member of LASERS. La. R.S. 11:416(A)(1) (1995).

Option 2 allowed a reemployed retiree to regain membership in LASERS by repaying any benefits received from the system, plus interest thereon. In addition, Option 2 required a retiree to pay into the system an amount equal to the employee and employer contributions which would have been paid had he become a member at the commencement of the resumption of covered employment. Upon such regaining of membership, Option 2 treated the reemployed retiree as if he had never retired by restoring all service credit standing at the time of his retirement and thereafter permitting the accumulation of additional service credit for work performed following reemployment. La. R.S. 11:416(A)(2) (1995). Finally, Option 3 allowed a retiree to request immediate suspension of his benefits and become a member of the system effective on the first day of reemployment. Upon subsequent retirement, Option 3 fully restored the reemployed retiree's suspended allowances. In addition, Option 3 provided a supplemental benefit attributable to the retiree's service and average compensation since reemployment on the condition he had worked for at least thirty-six months. La. R.S. 11:416(A)(3) (1995).

Act 455 of the Regular Legislative Session, effective June 30, 2001, amended La. R.S. 11:416. Act. 455 eliminated the three options and allowed a reemployed retiree to receive both his salary and full retirement benefits provided he had been retired for a period of at least twelve months (known as "the waiting period") before he returned to work. If a retiree returned to work before the expiration of the twelve month "waiting period," his benefits would be suspended for twelve months. Act 455 also restored membership in LASERS by requiring the reemployed retiree's

employer to remit both employer and employee contributions to LASERS based on the rate that applied to the retiree's position on the date of his reemployment. Additionally, if the retiree had worked and contributed to the system for a least thirty-six months following reemployment, Act 455 permitted his retirement allowance to be supplemented by an amount attributable to the service that occurred during reemployment and the average compensation calculated for the period of such reemployment. Thus, in total, Act 455's amendment to La. R.S. 11:416 allowed a reemployed retiree to (1) receive his salary plus his full retirement benefits after the twelve month waiting period; (2) regain membership in LASERS, and (3) earn a supplemental benefit if reemployed for over thirty-six months. La. R.S. 11:416, as enacted by 2001 La. Acts, Reg. Sess., No. 455.[1]

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[1] La. R.S. 11:416, as amended by Acts 455, provided in full:

> A. Any retiree shall be eligible to be reemployed by any employer agency in a position covered by the retirement system without a suspension of benefits, provided the retiree has been retired for a period of at last [sic] twelve months from the effective date of his retirement. The twelve-month period that occurs immediately following the effective date of retirement of each retiree, shall be know as the "waiting period."
>
> B. The retiree and the appointing authority of the employer agency covered by this system shall immediately notify the system of the retiree's date of employment, the amount of his starting salary, any subsequent changes in salary, and the date of termination of employment.
>
> C. (1)(a)(i) If any employer agency covered by the retirement system employs a retiree within the waiting period, then the benefits of the retiree shall be suspended for twelve months.

(Continued on following page)

(ii) The twelve months of suspended benefits shall occur regardless of whether the suspension occurs during twelve consecutive months or during twelve joined months where there are multiple periods of such reemployment.

(b)(i) Upon reemployment of a retiree, the employer shall remit employer contributions to this system based on the employer contributions rate that applies to the reemployed retiree's position on the date of such reemployment. Additionally, the employer shall withhold employee contributions from the reemployed retiree's compensation based on the employee contribution rate that applies to the reemployed retiree's position on the date of such reemployment and remit such contributions to this system. (ii) Upon termination of reemployment, if the reemployed retiree had worked and contributed to the system for at least thirty-six months, then his retirement allowance shall be increased by an amount that is attributable to the service that occurred during reemployment and the average compensation that is calculated for the period of such reemployment. The increased retirement allowance shall be calculated based upon the provisions of this Chapter that are in effect on the date of reemployment. In no event shall such a retiree's original retirement allowance, when combined with the increased retirement allowance, exceed the average compensation which is calculated for the period of reemployment.

(iii) Upon termination of reemployment, if the reemployed retiree had worked and contributed to the system for less than thirty-six months, then the employee contributions paid during the period of reemployment shall, upon application, be refunded to the retiree.

(c) Any retiree who is employed by an employer agency covered by this system on June 30, 2001, shall be exempt from the suspension of benefits, without regard to whether the retiree's effective date of reemployment occurred during the waiting period.

(2) Employers failing to submit the report required by Subsection B of this Section shall be liable for the repayment of contributions due to the system from the date of reemployment until such time as the report is filed.

Effective May 9, 2002, the legislature, by Act 165 of the 2002 First Extraordinary Session, repealed Act 455's benefit provisions and returned the law that existed prior to Act 455's enactment. Consequently, La. R.S. 11:416 once again required a retiree who returned to state employment to select one of the three options regarding his benefits.[2] In

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[2] La. R.S. 11:416, as amended by Act 165, now provides, in pertinent part:

> A. Regardless of age, if a retiree of the system is engaged or hereafter engages in employment which otherwise would render him eligible for membership in the system, he shall choose one of the following irrevocable options:
>
> (1)(a) **Option 1.** Any person on regular retirement under the Louisiana State Employees' Retirement System may be employed in any position covered by the system during any fiscal year, provided that his earnings in such employment do not exceed fifty percent of his annual retirement benefit for such fiscal year. For the purposes of this Section, there shall be an annual cost-of-living adjustment to the annual retirement benefit figure used in these computations. This cost-of-living adjustment shall be based upon and directly reflect the annual percentage increase or decrease in the Consumer Price Index for all Urban Consumers for the preceding year. The retiree may continue to receive his benefit until he earns more than fifty percent of his annual retirement benefit as defined herein, during any fiscal year, after which his retirement benefits shall be reduced so that the total reduction equals the amount earned in excess of fifty percent of his annual retirement benefit as adjusted under this Section. Retirees choosing this option shall not become contributing members of this system.
>
> (b) Notwithstanding the provisions of this Section or any other provision of law to the contrary, any retiree of the system who has at least thirty years of service credited to his account and is at least age seventy shall be exempt from any suspension or reduction of benefits received from this system as the result of reemployment.

(Continued on following page)

(2) **Option 2.** The retiree may regain membership by repaying all retirement benefits received from the system, plus interest thereon at the actuarial rate approved by the board of trustees of the system compounded annually from date of receipt until paid. In addition, the retiree shall pay into the system an amount equal to the employee and employer contributions which would have been paid had the retiree become a member at the commencement of the resumption of covered employment, plus interest thereon at the actuarial rate compounded annually from date of service until paid. Upon such regaining of membership, he shall have restored to his credit all service standing to his credit at the time of retirement and shall receive service credit for all service rendered since becoming so reemployed and thereafter shall be subject to the same conditions as are other members of the system which are not in conflict herewith.

(3) **Option 3.** The retiree may request immediate suspension of his benefit and become a member of this system, effective on the first day or reemployment. Upon such regaining of membership, he shall contribute thereafter at the current contribution rate as applicable to his position. Upon subsequent retirement, his suspended retirement allowance shall be restored to full force and effect. In addition, if he has worked and contributed for at least thirty-six months, his retirement allowance shall be increased by an amount attributable to his service and average compensation since reemployment based on the computation formula in effect at the time of subsequent retirement. If he has been reemployed for a period less than thirty-six months, upon termination of reemployment the contributions paid by the retiree since his reemployment shall, upon application, be refunded to the retiree. In no event shall the member receive duplicate credit for unused sick and annual leave that had been included in the computation of his original retirement allowance. Any supplemental benefit shall be based on reemployment service credit only and shall not include any other specific amount which may otherwise be provided in the regular retirement benefit computation formula. In the event of the member's death prior to subsequent retirement, payment benefits to the designated beneficiary or survivor

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repealing Act 455, however, the legislature enacted La. R.S. 11:416.1 which applied specifically to the retirees who had retired and been rehired during the 10-month interim period under Act 455. Instead of receiving the reemployment benefits under Act 455, those retirees were now required by La. R.S. 11:416.1 to select one of four irrevocable options:

> **§ 416.1. Reemployment of retirees under Act No. 455 of the 2001 Regular Session**
>
> A retiree who retired under the provisions of Act No. 455 of the 2001 Regular Session and was rehired prior to the effective date of this Section in employment which otherwise would render him eligible for membership in the system shall choose one of the following irrevocable options:
>
> (1) Option 1 as provided in R.S. 11:416(A).
>
> (2) Option 2 as provided in R.S. 11:416(A).
>
> (3) Option 3 as provided in R.S. 11:416(A).

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shall be in accordance with the option selected by the member at the time of his original retirement. No change in the option originally selected by the member shall be permitted except as provided in R.S. 11:446(C). In no event shall the supplemental benefit exceed an amount which, when combined with the original benefit, equals one hundred percent of the average compensation figure used to compute the supplemental benefit. Under no circumstances shall any person who has regained membership pursuant to the provisions of this Paragraph be allowed to purchase service credit for any period employed int eh [sic] state service during which he continued to draw his retirement.

. . .

> (4) Option 4. At the request of the retiree his retirement benefits shall be suspended for twelve months following the effective date of his retirement or until his reemployment ends, whichever occurs first. The retiree shall receive his retirement benefits after such suspension, but he shall accrue no additional service credit during reemployment. Under this option, neither the retiree nor the employer shall make any contribution to the system.

Acts 2002, 1st Ex. Sess., No. 165, § 2 further provided as follows:

> R.S. 11:416.1 as enacted by Section 1 of this Act shall be applicable to any person who retired on or after June 30, 2001. Within thirty days after the effective date of this Act, any person who retired under the provisions of Act No. 455 of the 2001 Regular Session of the Legislature and was rehired before the effective date of this Act shall choose one of the Options provided in Section 1 of this Act. Should any such person fail to make a choice within the thirty-day period, the retiree shall be considered as returning to active service under Option 3 as provided in Section 1 of this Act. However, this Act shall have no effect upon any person who retired prior to the effective date of Act No. 455 of the 2001 Regular Session of the Legislature who is reemployed and receiving retirement benefits when this Act becomes effective and such person shall continue to receive such retirement benefits.

The plaintiffs in this case are 161 state employees of the Department of Corrections who retired after June 30, 2001 and had been rehired before May 9, 2002. In fact, the record reflects that after considering the reemployment

benefits offered by Act 455, certain of these plaintiffs actually retired on a Friday and were rehired the following Monday. The plaintiffs filed suit against the Board of Trustees of LASERS, seeking a declaratory judgment that La. R.S. 11:416.1, as enacted by Act 165, was unconstitutional. On May 28, 2002, the trial court issued a temporary restraining order enjoining LASERS from implementing La. R.S. 11:416.1 as to the plaintiffs. The temporary restraining order was amended on May 29, 2002, to suspend the requirement of Act 165 to make an option selection pending further orders of the court.

Trial was held on June 12, 2002, on the preliminary and permanent injunctions, as well as the request for declaratory relief. Plaintiffs argued that La. R.S. 11:416.1, by retroactively depriving them of the benefits offered under Act 455, violated both the Contract Clauses of the United States and Louisiana Constitutions, as well as La. Const. Art. X, § 29, which affords special protection to the pensions of state officers and employees. Defendants argued that none of the plaintiffs had a "vested" right in any of the reemployment benefits provided by Act 455 and thus, the enactment of La. R.S. 11:416.1 was a permissible exercise of the legislature's plenary powers. On June 26, 2002, in its oral reasons for judgment, the trial court found that La. R.S. 11:416.1 as enacted by Act 165 was violative of Article I, § 10 of the United States Constitution and Article I, § 23 of the Louisiana Constitution and Article X, § 29 of the Louisiana Constitution, as well as the Fourteenth Amendment. Defendant devolutively appealed the trial court's decision to this Court pursuant to Article V, § 5(D)(1) of the Louisiana Constitution of 1974 which grants this Court appellate jurisdiction over all cases in

which "a law or ordinance has been declared unconstitutional."

DISCUSSION

Acts 2002, No. 165, which enacted La. R.S. 11:416.1 effective May 9, 2002, expressly declared that the provisions of La. R.S. 11:416.1 would apply to "any person who retired on or after June 30, 2001." Thus, pursuant to La. C.C. Art. 6, which provides that "in the absence of contrary legislative expression, substantive laws apply prospectively only," La. R.S. 11:416.1 has retrospective application. ***Segura v. Frank,*** 630 So.2d 714, 721 (La. 1994). However, "this Court has observed that the principle contained in La. C.C. art. 6 has constitutional implications under the due process and contract clauses of both the United States and Louisiana Constitutions." ***Id.*** (Cites omitted.) "Thus, even where the legislature has expressed its intent to give a substantive law retroactive effect, the law may not be applied retroactively if it would impair contractual obligations or disturb vested rights." ***Id.*** As this Court has explained, a law does not operate retroactively unless it (1) evaluates the conditions of the legality of a past act, or (2) modifies or suppresses the effects of a right already acquired. ***Walls v. American Optical Corp.,*** 98-0455 (La. 9/8/99), 740 So. 2d 1262.

Plaintiffs argue that in this case, the protection against retroactively applying laws to state employees regarding their retirement benefits is even stronger than the "vested rights" protections above, as La. Const. Art. X, § 29(E)(5), added pursuant to Act 947 of the 1987 Regular Session, specifically provides:

> The *accrued benefits* of members of any state or statewide public retirement system *shall not be diminished or impaired. Future benefit provisions* of the state and statewide public retirement systems *shall only be altered by legislative enactment.* (Emphasis added.)

In this case, plaintiffs point out that the only persons eligible to receive the benefits under Act 455 were employees who had accumulated enough service time to retire under LASERS. Plaintiffs therefore claim that their right to the benefits under Act 455 had "accrued" by virtue of their years of service prior to their initial retirement. As a result, once they had retired and were reemployed, they became entitled to receive full salary, retirement benefits after the twelve-month suspension, continued membership in the system, and a supplemental retirement after reemployment for more than thirty-six months. However, plaintiffs argue that none of the four options under La. R.S. 11:416.1 permit plaintiffs to receive all of these benefits. For instance, under Option 3, plaintiffs cannot receive their retirement benefits after the twelve-month waiting period. Under Option 4, plaintiffs cannot earn a supplemental benefit if reemployed for more than thirty-six months. Thus, plaintiffs argue that La. R.S. 11:416.1 requires them to select an option which would result in diminishing or impairing their accrued benefits in direct violation of Article X, Section 29(E)(5).

Defendant argues that neither Article X, § 29(E)(5), nor the prohibition against disturbing "vested rights," is violated in this case because plaintiffs' rights to the reemployment benefits offered in Act 455 had neither "vested" nor "accrued." Their rights to receive their retirement benefits along with their salaries during their period of

reemployment neither "vested" nor "accrued" until they had been reemployed for twelve months. Similarly, their rights to receive an additional supplemental benefit along with their salaries and retirement benefits did not "vest" nor "accrue" until they had been reemployed for thirty-six months. Thus, defendant argues, because the law was changed prior to the time plaintiffs fulfilled the twelve month waiting period or were reemployed for thirty-six months, the law does not operate retroactively, nor does it diminish or impair accrued rights.

We agree. Under this Court's interpretation, a "vested" right "must be absolute, complete and unconditional, independent of a contingency, and a mere expectancy of future benefit . . . does not constitute a vested right." ***Sawicki v. K/S Stavanger Prince,*** 01-0528 (La. 12/7/01), 802 So. 2d 598. Similarly, "accrued" has been defined to mean "in the sense of due and payable; vested," *Black's Law Dictionary,* and "to day on which the creditor could institute his demand." ***Ledoux v. City of Baton Rouge,*** 99-2061 (La. 2/29/00), 755 So. 2d 877, 879-80. Further, La. R.S. 11:403(33) specifically defines a "vested right" in the context of LASERS as "when a member obtains retirement eligibility as to age and service in accordance [sic] the provisions of this Chapter." "Retirement" is defined to mean "termination of active service, with a retirement allowance granted under the provisions of this Chapter." La. R.S. 11:403(23). "Termination" is defined to mean "complete cessation of employment with the state." La. R.S. 11:403(31). There is no doubt that the plaintiffs had a "vested" or "accrued" right in retirement benefits under LASERS as they had obtained retirement eligibility as to age and service, and, in fact, terminated their employment with the state. Had they not decided to

become reemployed, they would have been entitled to their retirement benefit, and, in this case, they selected a mode of payment of these benefits under La. R.S. 11:446.[3] Indeed, defendant concedes that plaintiffs' right to their general retirement benefits "vested" or "accrued" upon their retirement.

However, the benefits offered by La. R.S. 11:416 are not retirement benefits, but reemployment benefits. Although these reemployment benefits include the right to certain retirement benefits along with a salary after reemployment for a certain period of time, they do not begin to accrue until a retiree becomes reemployed. Plaintiffs' rights to their retirement benefits under LASERS is not contested, it is their right to be reemployed and receive both their salary *and* their retirement benefits after 12 months of reemployment, and then their salary, retirement benefits, *and* supplemental benefits after 36 months of reemployment that is at issue. These plaintiffs simply had not fulfilled the necessary conditions of reemployment in order to be entitled to receive their salary along with their retirement benefits because they had not been reemployed for 12 months prior to the law being changed; similarly they had not been reemployed for 36 months which was a necessary condition to being able to also receive a supplemental benefit.[4]

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[3] La. R.S. 11:446 allows a retiree to select among certain options providing different modes of payment by which retirement benefits may be paid.

[4] It is important to note that by the language of Act 165, it is apparent that the legislature was aware of its authority. Section 2 of Act 165 provides that La. R.S. 11:416.1 is only applicable "to any person

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As in the area of retirement benefits, where courts have consistently held that a public employee's right to retirement benefits does not "vest" until eligibility for retirement is attained, reemployment benefits for retirees likewise do not vest until eligibility as to age and service is attained. Prior to the achievement of eligibility, courts have deemed the right to be inchoate and the details of a contributory retirement system, such as rate of contribution, benefits, length of service, and age requirements could be modified to the prejudice of the employee. ***Patterson v. City of Baton Rouge,*** 309 So. 2d 306 (La. 1975); ***Faulk v. State,*** 382 So. 2d 992 (La. App. 1 Cir. 1980); ***State, ex rel. Murray v. Board of Trustees of Police Pension Fund for City of New Orleans,*** 259 So. 2d 613 (La. App. 4 Cir. 1972); ***Adolph v. Sewerage & Water Board Pension Committee,*** 202 So. 2d 664 (La. App. 4 Cir. 1967); ***Young v. Department of Highways,*** 160 So. 2d 391 (La. App. 1 Cir. 1964); ***Bowen v. Board of Trustees of Police Pension Fund,*** 76 So. 2d 430 (La. App. Orl. 1954). In particular, it has been held that the legislature can "validly enact laws to change the inchoate

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who retired on or after June 30, 2001." It further provides that "this Act shall have no effect upon any person who retired prior to the effective date of Act No. 455 of the 2001 Regular Session of the Legislature. Those individuals who were reemployed and receiving retirement benefits when this Act becomes effective shall continue to receive such benefit." This is appropriate because Act 455 provided at La. R.S. 11:416(C)(1)(c) that "any retiree who is employed by an employer agency covered by this system on June 30, 2001, shall be exempt from the suspension of benefits, without regard to whether the retiree's effective date of reemployment occurred during the waiting period." These people immediately vested in the benefit and therefore under the appropriate interpretation of the constitutional provision could not have their benefits "diminished or impaired."

retirement rights of employees to (1) increase the required length of service from sixteen years to twenty years (***Bowen***), (2) offset disability benefit payments under a retirement system by the amount of worker's compensation benefits under a retirement system by the amount of worker's compensation benefits received from the same disability (***Patterson***); (3) require an employee who has membership in two public retirement systems to choose one and require that the system refund all contributions at the rate of 5% simple interest (***Faulk***), and (4) change an alternate retirement program of age 70 or 15 years service to a mandatory retirement at the age of 65 (***Young***)." ***Louisiana State Troopers Association, Inc. v. Louisiana State Police Retirement Board,*** 417 So. 2d 440, 443-44 (La. App. 1 Cir. 1975).[5]

Likewise, we hold that reemployment benefits for retirees can be modified prior to the point when the retirees become eligible for those benefits. Because these rights have neither "vested" nor "accrued," there is no due process violation, nor is there a violation of La. Const. Art. X, § 29(E)(5), by virtue of the enactment of La. R.S. 11:416.1. The statute does what the constitution allows, it alters "future benefit provisions of the state and statewide public retirement systems." La. Const. Art. X, § 29(E)(5).

The plaintiffs also point to Article X, § 29(B) of the Louisiana Constitution which states:

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[5] Although plaintiffs argue that these cases are not controlling because they were decided before the 1987 Constitutional Amendment of La. Const. Art. X, § 29(E)(5), the result in these cases would have been the same under that amendment because the employees' rights in those cases had not yet "accrued."

> Membership in any retirement system of the state or of a political subdivision thereof shall be a *contractual relationship* between employee and employer, and the state shall guarantee benefits payable to a member of a state retirement system or retiree or to his lawful beneficiary. (Emphasis added.)

Because membership in LASERS expressly creates a "contractual relationship between employee and employer," plaintiffs argue that the application of La. R.S. 11:416.1 violates the Contracts Clauses of the United States and Louisiana Constitutions. *See* Lee Hargrave, *"Statutory" and "Horatory" Provisions of the Louisiana Constitution of 1974,* 43 La. L. Rev. 647, 674-75 (1983) ("Designating membership in a public retirement system a 'contractual relationship' is an attempt to invoke the constitutional protection against impairment of the obligations of contracts"). The Contracts Clause, Article I, § 10(1) of the United States Constitution, provides: "No state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligations of Contracts . . . " Article I, § 23 of the Louisiana Constitution of 1974 provides: "No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be enacted." This Court has described these constitutional provisions as "virtually identical" and "substantially equivalent." ***Segura v. Frank,*** *supra* at 728; ***Board of Comm'rs v. Dept. of Natural Resources,*** 496 So. 2d 281, 291 (La. 1986). "Although the language of each clause if facially absolute, its prohibition must be accommodated to the inherent police power of the state to safeguard the vital interests of its people." ***Segura v. Frank,*** *supra* (citing ***Energy Reserves Group, Inc. v. Kansas Power & Light Co.,***

459 U.S. 400, 410, 103 S. Ct. 697, 704, 74 L. Ed. 2d 569 (1983)).

In ***Board of Comm'rs,*** *supra,* this court detailed "the appropriate Contract Clause standard" as enunciated by the Supreme Court in ***Energy Reserves,*** *supra.* ***Segura v. Frank,*** *supra* at 728-29. That standard requires a reviewing court to conduct the following four-step analysis: first, the court must determine whether the state law would, in fact, impair a contractual relationship; second, if an impairment is found, the court must determine whether the impairment is of constitutional dimension; third, if the state regulation constitutes a substantial impairment, the court must determine whether a significant and legitimate public purpose justifies the regulation; finally, if a significant and legitimate public purpose exists, the court must determine whether the adjustment of the rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. ***Energy Reserves,*** *supra,* 459 U.S. at 410-413, 103 S. Ct. at 704-05; ***Segura v. Frank,*** *supra* at 729.

As to the first part of the test, although La. Const. Art. X, § 29(B) expressly states that membership in LASERS creates a "contractual relationship," this constitutional provision serves to expressly recognize the existence of a contract between the state and employee as to those retirement benefits that are vested. Upon their retirement, plaintiffs had a contract with the state for those retirement benefits that were vested. However, as explained above, the benefits provided by Act 455 were not retirement benefits, they were reemployment benefits, offering conditions under which a retiree could receive his retirement benefits and supplemental benefits, while at

the same time receiving a full salary. In this case, none of the plaintiffs achieved sufficient service to fulfill these conditions, and thus these reemployment benefits had not vested. *See generally* 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law, Substance and Procedure,* § 15.8 (3d Ed. 1999) (explaining that the Contract Clause is traditionally used to invalidate statutes that retroactively impair contractual obligations). In fact, this Court has never utilized a Contract Clause analysis to invalidate changes to the state's retirement system which did not take away vested rights, and plaintiffs have presented insufficient grounds for us to consider doing so today. Indeed, as stated by the Rhode Island Supreme Court, "[w]e believe that converting the reemployment opportunities formerly available to these public pensioners into legally enforceable contract rights would 'play havoc with basic principles of contract law, traditional contract clause analysis, and, most importantly, the fundamental legislative prerogative to reserve to itself the implicit power of statutory amendment and modification.'" ***Retired Adjunct Professors of the State of Rhode Island v. Lincoln C. Almond, Governor of the State of Rhode Island,*** 690 A. 2d 1342, 1346 (R.I. 1997)[6] (citing ***Pineman***

[6] In this case, professors at a state university retired relying on a state statute that allowed them to be reemployed by the state for up to 75 full days or 150 half days before their pension payments would be suspended. After they retired and became reemployed, the legislature changed the statute to provide that the reemployed retirees' salary could not exceed $10,000 in one calendar year without their pension being suspended. The Rhode Island Supreme Court held that the legislature was free to enact retrospective legislation in this situation because, in doing so, it did not impair any contractual obligations or interfere with any of plaintiffs' vested rights. 690 A. 2d at 1348.

v. Oechslin, 488 A. 2d 803, 808 (Conn. 1985)). As we have found that plaintiffs have not met their burden under part one of the Contract Clause analysis that the statute impaired a contractual obligation, our Contract Clause analysis is at an end.[7]

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[7] We note plaintiffs' argument that their rights were substantially impaired by the enactment of Act 455. Certain plaintiffs testified that after Act 455 was enacted, they contemplated its provisions and discussed the benefits with their families and financial advisors before making the determination to retire and then seek reemployment. However, "[s]tate regulation that restricts a party to the gains it reasonably expected from the contract does not necessarily constitute a substantial impairment." ***Segura v. Frank,*** *supra* at 729 (citing ***Energy Reserves,*** *supra,* 459 U.S. at 411, 103 S. Ct. at 704). Furthermore, the Department of Corrections was under no contractual or other legal obligation to rehire these state employees once they retired, thus any loss they suffered as a result of retiring was a known risk which they knowingly undertook.

Finally, there is no evidence that these plaintiffs suffered any detriment by virtue of Act 165. These plaintiffs, under La. R.S. 11:416.1 as enacted by Act 165, must now make an election to retain the right to earn a supplemental benefit after thirty-six months of service credit and suspend receipt of the retirement benefit under Option 3, or elect to collect a retirement benefit after twelve months of service credit and give up the right to a supplemental benefit under Option 4. If the member feels that neither option is to his or her benefit, then under Option 2 the retiree may rejoin LASERS as if he or she had not retired and continue accruing benefits under the same Plan Document that they were under prior to retirement.

Plaintiffs also argue that by choosing to retire and then seek reemployment, they lost any annual and sick leave time that had accrued to their credit. However, this leave was converted to retirement credit pursuant to La. R.S. 11:424 and would have happened upon their retirement regardless of the existence of Act 455. Further, if these plaintiffs wish to have their leave back, Option 2 of La. R.S. 11:416 provides them with that choice. Similarly, plaintiffs complain that by virtue of being induced to retire and seek reemployment by Act 455, they lost their compensatory time, known as "K-time." However, this

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CONCLUSION

La. R.S. 11:416.1, effective May 9, 2002, which specifically applies to state employees who retired and were rehired between June 30, 2001, and May 9, 2002, does not violate La. Const. Art. X, § 29, nor does it violate the due process or contract clauses of the Louisiana or United States Constitutions. The rights provided by Act 455, which was in effect when these plaintiffs retired and were rehired, effective June 30, 2001, were reemployment benefits which had neither vested nor accrued when the law was changed by La. R.S. 11:416.1.

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would have happened upon their retirement in any event by virtue of either a departmental policy and/or a Civil Service Regulation. There is no provision in the Plan Document that provides for a payment by LASERS or conversion to retirement credit for K-time. Once again, if a plaintiff wishes to have his or her K-time back, Option 2 potentially places him in the same position he would have been in had he not retired. Finally, plaintiffs argued that an employee's anniversary dates could have been changed by virtue of their retirement and reemployment, as induced by Act 455. Civil Service Regulations provide that if an employee misses one working day in between retiring and returning to work, that employee's anniversary date would be six months from their reemployment date. As the Human Resources Manager for the Department of Public Safety and Corrections testified:

> So employees . . . say they retired on January 20th. If their original anniversary date was due in April, that's their annual raise. You get your annual merit increase if you meet performance standards on your anniversary date. If it was due on April, now their anniversary date was moved until July.

Hence, it would now take longer for an employee to receive their merit increase under those circumstances. However, there is no evidence of any particular plaintiffs who were victims of this particular circumstance, and, once again, Option 2 would appear to offer them some relief if necessary.

DECREE

For the reasons expressed herein, the judgment of the trial court declaring La. R.S. 11:416.1 to be unconstitutional is reversed and the matter is remanded to the trial court for judgment consistent with this opinion.

REVERSED AND REMANDED.

KNOLL, dissenting

In this important policy making decision, the majority fails to seize the opportunity to recognize that the enactment of Article X, Sections 29(B) and (E)(5) reflects a judgment by the legislature and the people of this State that retirement benefits deserve greater protection from legislative modification. Instead, the majority continues to rely on jurisprudence arising before these provisions were added to our Constitution for the proposition that prior to the achievement of eligibility, a public employees' right to his or her retirement benefits is "inchoate" and details of a contributory retirement system can be modified to the "prejudice of the employee." In so doing, I find that the majority's views are unfortunately reminiscent of the "gratuity approach," whereby pensions are considered to be "gifts" from the state and errs in several respects.

The majority first errs in characterizing the benefits afforded under Act 455 as "reemployment benefits." In my opinion, these benefits are clearly retirement benefits as Act 455 restored membership in LASERS by requiring the remittance of both employer and employee contributions to LASERS based on the rate that applied to the retiree's position on the date of his reemployment. In addition, Act 455 permitted an employee's retirement allowance to be

supplemented by an amount attributable to the service that occurred during reemployment and the average compensation calculated for the period of such employment. Indeed, the first sentence of La. R.S. 11:416.1 begins "a retiree who *retired under the provisions of Act No. 455* of the 2001 Regular Session" and later continues "any person who *retired under the provisions of Act. No. 455* of the 2001 Regular Session of the Legislature." (emphasis added).

What is more troubling to me, however, is the majority's treatment of Article X, Section 29(B). The majority announces that Article X, Section 29(B) "serves to expressly recognize the existence of a contract between the state and the employee as to those retirement benefits that *vested.*" (emphasis added).[1] This statement confuses the relevant differences between "vesting" and "contractual" protection. As one court has properly recognized, " 'vesting' and 'contractual' are not synonymous." *National Education Association – Rhode Island v. Retirement Board of the Rhode Island Employees' Retirement System,* 172 F.3d 22 (1st Cir. 1999).

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[1] Citing Article X, Section 29(E)(5), the majority explains: "The statute does what the constitution allows, it alters 'future benefit provisions of the state and statewide public retirement systems.' " In my view, this is a misreading of the statute because it places too much emphasis on the word "future," while ignoring important surrounding language. Indeed, the provision does *not* say "the legislature may alter future benefits." Rather, it says that "future benefit provisions" of LASERS "shall only be altered by legislative enactment." Thus, I believe that this section is not a grant of power, but instead merely creates a constitutional prohibition against permitting the Board of Trustees to alter retirement benefits – retirement benefit provision can *only* be altered by the legislature.

> '[V]esting' refers to the period provided by a plan for which an employee must work to become eligible for a pension if and when he attains retirement age. . . . *Whether a plan affords contractual protection against a change in its terms is a different question.* A plan may not protect "vested" employees against change, or alternatively may provide some contractual protection even for unvested employees.

Id. at 28 (emphasis added).

Our constitution conclusively answers this question by expressly stating that membership in LASERS "shall be a contractual relationship."[2] Indeed, during the Louisiana Constitutional Convention of 1973, Delegate Aertker underscored the importance of providing contract clause protection to state employees' retirement benefits when he stated:

> Well, Mr. Jenkins, it was the feeling of the committee, and after listening to people talk to us, that this matter of a retirement is quite a sensitive issue and that this would provide for many people a comfortable feeling that in the constitution of this state they felt that they had a provision which stated that their retirement actually represented a contractual relationship with this state, and that they had the full faith and credit

[2] The United States Supreme Court has recognized that "absent a clear indication that the legislature intends to bind itself contractually," the presumption is that a law is not intended to create "contractual or vested rights." *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466, 105 S. Ct. 1441 (1985). To me, the enactment of Article X, Section 29(B) could not have made that intent any clearer.

> of this state back of it to make sure that they, when they got old and dottering and feeble, that they were going to get that check every month and make sure it kept coming in, and they just like to see it written down in the constitution.

IX Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, Dec. 5, 1973 at 2561. When later asked about the need for making membership in LASERS a "contractual relationship" since the Bill of Rights already prohibited the impairment of obligations, Delegate Aertker responded:

> It . . . it might, Mr. Jenkins, but I really believe the committee had in mind the provision in the Bill of Rights that the state could not impair the contract, and that's why they put the words in there "contractual relationship," with the understanding that if they put this and included it in the constitution, even in the Bill of Rights the state would not be able to impair it in any way, and that, therefore, it would be a contract that everyone understood they were operating under.

IX Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, Dec. 5, 1973 at 2563.

Nevertheless, in spite of these statements, the majority notes that "this Court has never utilized a Contract Clause analysis to invalidate changes to the state's retirement system."[3] However, this case marks the first

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[3] The majority then cites a case arising from the Rhode Island Supreme Court for the proposition that "converting the reemployment opportunities formerly available to these public pensioners into legally enforceable contract rights would 'play havoc with basic principles of contract law, traditional contract clause analysis, and, more

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opportunity for this Court to address legislative modifications of state employees' retirement benefits since the enactment of Article X, Section 29(B), *i.e.,* since the pronouncement that membership in LASERS "shall be a contractual relationship" was added to our Constitution in 1974. *See* Lee Hargrave, *"Statutory" and "Hortatory* [sic]" *Provisions of the Louisiana Constitution of 1974,* 43 La. L. Rev. 647, 674-75 (1983) ("Designating membership in a public retirement system a 'contractual relationship' is an attempt to invoke the constitutional protection against impairment of the obligations of contracts"). Moreover, at least four state supreme courts have utilized a Contract Clause analysis to invalidate modifications to the state pension system and *none of their constitutions contained provisions designating membership to be a "contractual relationship." See Bailey v. State,* 500 S.E.2d 54 (N.C. 1998); *Oregon State Police Officers' Ass'n v. State,* 918 P.2d 765 (Ore. 1996); *Booth v. Sims,* 456 S.E.2d 167 (W. Va. 1994); *Halpin v. Nebraska State Patrolmen's Retirement System,* 320 N.W.2d 910 (Neb. 1982).

The majority states that plaintiffs have presented "insufficient grounds" for this Court to consider utilizing a Contract Clause analysis to invalidate changes to the state retirement system. With this point, I most strongly

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importantly, the fundamental legislative prerogative to reserve to itself the implicit power of statutory amendment and modification.'" *Retired Adjunct Professors of the state of Rhode Island v. Lincoln C. Almond, Governor of the State of Rhode Island,* 690 A.2d 1342, 1346 (R.I. 1997). Significantly, the majority fails to mention that, unlike the Louisiana Constitution, the Rhode Island Constitution does *not* contain a provision stating that membership in the state retirement system is a "contractual relationship."

disagree. As discussed in greater detail below, plaintiffs reasonably relied upon the substantial increase in benefits afforded under Act 455 in deciding whether to retire from public service. Nevertheless, the legislature, for no other reason than to correct its own financial miscalculations, enacted La R.S. 11:416.1 which retroactively divested these benefits less than a year after they were first offered. Even further, La. R.S. 11:416.1 was directed to a finite group of reemployed retirees whose continued receipt of the benefits under Act 455 did not threaten the actuarial soundness of the retirement system.

CONTRACT CLAUSE ANALYSIS

In my view, the majority applies the wrong test in addressing plaintiffs' Contract Clause claim. The United States Supreme Court has affirmed there exists "a dual standard of review" for impairment of contract cases. *United States Trust Company of New York v. New Jersey,* 431 U.S. 1, 26 n.25, 97 S.Ct. 1505, 1519 n.25 (1977) (citing *Perry v. United States,* 294 U.S. 330, 350-51, 55 S.Ct. 432, 435 (1935)); *Caritas Services, Inc. v. Department of Social and Health Services,* 869 P.2d 28, 35 n.6 (Wash. 1994). Impairments of a state's own contracts "face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties." *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244 n.15, 98 S.Ct. 2716, 2716 n.15 (1978) (citing *United States Trust Company,* 431 U.S. at 22-23, 97 S.Ct. at 1517 (1977)). *See Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 413 n.14, 103 S.Ct. 697, 705 n.14 (1983) ("In the present case, of course, the stricter standard of *United States Trust Co.* does not apply because Kansas has not altered its own contractual obligations").

For both private and public contracts, the initial inquiry is whether the state law has in fact operated as a substantial impairment of a contractual relationship.[4] In contrast to the test for private contracts which next focuses on whether a significant and legitimate public purpose justifies the impairment, *see Segura v. Frank,* 93-1271 (La. 1/14/94), 630 So.2d 714, the stricter Contract Clause standard for public contracts requires a determination as to whether the impairment is both "reasonable and necessary to serve an important public purpose." *United States Trust Company,* 431 U.S. at 25, 97 S.Ct. at 1519; *Carlton v. State,* 694 P.2d 1 (Wash. 1985); *MacLean v. State Board of Retirement,* 733 N.E.2d 1053, 1058 (Mass. 2000); *Opinion of Justices,* 609 A.2d 1204, 1210 (N.H. 1992); *Davies v. Minneapolis,* 316 S.W.2d 498, 502 (Minn. 1982); *Buckman v. Montana Deaconess Hospital,* 730 P.2d 380, 385 (Mont. 1986); *Halpin,* 329 N.W.2d at 915; *Parker v. Wakelin,* 123 F.3d 1, 11 (1st Cir. 1997); *Maryland Teachers Ass'n v. Hughes,* 594 F.Supp. 1353, 1361-62 (D.Md. 1984).

Substantial Impairment

In addressing plaintiffs' Contract Clause claim, the majority states that "there is no evidence that these plaintiffs suffered any detriment by virtue of Act 165."

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[4] Some courts have described this prong of the analysis as involving three components: (1) does a contractual relationship exist, (2) does the change in the law impair that contractual relationship, and if so, (3) is the impairment substantial? *See, e.g., Parker v. Wakelin,* 123 F.3d 1 (1st Cir. 1997); *Koster v. City of Davenport,* 183 F.3d 762 (8th Cir. 1999). However, because our constitution expressly declares there to be a "contractual relationship," it only needs to be determined whether the impairment was "substantial."

Again, I disagree. The majority is correct in concluding that if the plaintiffs wish to have their leave back, Option 2 of La. R.S. 11:416.1 provides them with that choice. Plaintiffs' compensatory time (or "K-time"), however, is *gone for good*. Indeed, the majority is simply wrong in stating that Option 2 "potentially" places them in the same position had they not retired. A review of the trial transcript reveals that K-time is an employer obligation that these employees lost forever by retiring under Act 455.

> **Mr. Torres (Counsel for LASERS)**: These people retired and they didn't lose any of their benefits and when they testify – argue their loss, it was either converted to retirement benefit or converted to an actuarial cash benefit and they were given all the benefits they had accrued to that date. And that is very important. They lost no benefits by retiring. They got every benefit they were entitled to on the date of retirement. We paid them. Now –
>
> **The Court**: You paid them for sick leave and compensatory time?
>
> **Mr. Torres**: Depending on the option – we didn't do compensatory time. That's an employer responsibility.
>
> **The Court**: Did you pay them for compensatory time?
>
> **Mr. Torres**: We don't do compensatory time in the retirement system. That's an employer obligation. We use leave, annual and sick leave. Here is the two choices –

The Court: So the answer to the question is no.

Mr. Torres: No, not for compensatory time.

The majority opinion goes on to explain that the loss of K-time "would have happened upon their retirement in any event by virtue of either a departmental policy and/or a Civil Service Regulation." However, the majority misses the point because both plaintiffs who testified at trial explained that they would *not* have retired had Act 455 not been in effect. The testimony at trial of plaintiff Gregg Smith particularly captures the special considerations unique to these plaintiffs.

Q. Did you take some action with respect to your job in February of this year?

A. Yes, I did.

Q. And what was that action?

A. I retired under the provisions of Act 455 and was rehired – I retired on a Friday and was rehired that Monday under the provisions of Act 455.

Q. When you signed the paperwork to do that, did you do it on two different days or all on the same day? How did that happen?

A. I signed the paperwork one day. I found out about the law in November or December of 2001. We did not know if it would be available to us or we would be eligible to be rehired. When we did find out, I did some investigation and after consulting with various people, I decided to retire under the Act 455.

* * *

Q. You said you talked to some people about making – How did you decide to make this decision?

A. Well, we were given some basic information from our personnel department about the provisions of the act. They told us the pros and cons, what we would benefit, things we would have to give up and –

BY THE COURT:

Q. What were the pros and cons?

* * *

A. I would be able to remain in my job, that after a period of twelve months I would get a retirement benefit and then during a thirty-six month period I would pay into a retirement program and remain part of the retirement program. If I stayed in service at least thirty-six months, the LASERS system would recalculate an additional benefit for me for retirement purposes . . .

* * *

COUNCIL FOR PLAINTIFFS:

Q. And so you studied Act 455 along with some advice from others?

A. Yes. I spoke to my wife. I sought out the advice of a certified public accountant. LASERS always says before you retire to please investigate it, to weigh the pros and cons and to seek the

> professional advice of a financial advisor and that's what I did.[5]

Thus, by retiring in order to obtain the benefits offered under Act 455, plaintiffs passed up the opportunity to *use* their accumulated K-time. Indeed, this is no small consequence, as Shannon Templet, Human Resources Manager for the Department of Public Safety and Corrections, testified that a combined total of over 11,800 hours of compensatory time was lost among the 161 plaintiffs. Accordingly, I agree that "at the very least, where the contract right or obligation impaired was one that *induced* the parties to enter into the contract and upon the continued existence of which they have *especially relied,* the impairment must be considered 'substantial' for purposes of the Contract Clause." *Baltimore Teachers Union v. Mayor of Baltimore,* 6 F.3d 1012, 1016 (emphasis added). *See also Christensen v. Minneapolis Municipal Employees Retirement Bd.,* 331 N.W.2d 740, 749 (Minn. 1983) ("In the realities of the modern employment marketplace, the state reasonably expects its promise of a retirement program to induce persons to accept and remain in public employment, and persons are so induced, and injustice can be avoided only by enforcement of that promise"); *Spannaus,* 438 U.S. at 244 n.14 (noting that the court in *El Paso* concluded that the "measure taken . . . was a mild one indeed" because the buyer had *not* been substantially

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[5] Similarly, plaintiff Cornel Hubert, testified at trial:

> Well, I talked to my human resources director after learning about the program or the law, went home for that weekend and my wife and I discussed it. We looked at it – I looked over the pros and cons of doing this and the decision was to go through with it.

induced to enter into the contract); *Andrews v. Anne Arundel County,* 931 F. Supp. 1255, 1265 (M.D. Dist. 1996) ("The reliance which the aggrieved party placed on the contractual obligations appears to be the primary yardstick by which the degree of impairment is determined.").[6]

Reasonable and Necessary to Serve an Important Public Purpose

I further find the enactment of La. R.S. 11:416.1 was neither reasonable nor necessary to serve an important public purpose.[7] During oral arguments, counsel for LASERS explained that within months of Act 455's effective date, it quickly became apparent that the legislature

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[6] The majority opinion cites *Segura v. Frank, supra,* for the proposition that "state regulation that restricts a party to gains it reasonably expected from a contract does not necessarily constitute a substantial impairment." I believe this blanket pronouncement clearly did not have the particular facts of this case in mind. Although this Court has upheld numerous challenges to legislative modifications of the state retirement system, in each instance the legislature altered the pension provisions of state employees *before* retirement, such as by reducing the contribution rate or increasing the mandatory years of service. In my opinion, it is one matter to adjust employees' retirement packages years before they retire – it is quite another matter to retroactively withdraw the benefits reasonably relied upon by state employees in making life impacting decisions.

[7] In applying this standard, the United States Supreme Court has stated that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self interest is at stake." *United States Trust Company,* 431 U.S. at 25, 97 S.Ct. at 1519; *Segura,* 630 So.2d at 732. "If a State could reduce its financial obligations whenever it wanted to spend money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *United States Trust Company,* 431 U.S. at 25, 97 S.Ct. at 1519.

had grossly underestimated the act's fiscal ramifications. As a result, the benefits provided under Act 455 had to be repealed because, as state employees began to retire and return to work, the financial figures reflected the retirement system in the long run could not afford the substantial increase in benefits.[8] To make certain, I agree that maintaining the fiscal integrity of the state retirement system is an important public purpose. Indeed, Article X, Section 29(E)(1) of the Louisiana Constitution of 1974 declares: "The actuarial soundness of state and statewide retirement system shall be attained and maintained and the legislature shall establish, by law, for each state or statewide retirement system, the particular method of actuarial valuation to be employed for purposes of this Section." Furthermore, this Court has acknowledged that "[c]hanges in details, such as length of service required, contributions needed, and age requirements, to keep the fund on sound actuarial practices, are essential." *Bowen,* 76 So.2d at 435. Accordingly, because Act 455 had the potential to threaten the actuarial soundness of LASERS, I have no trouble finding that the legislature reacted reasonably in reinstating the original three irrevocable options for reemployed retirees. *See Maryland State Teachers Association v. Hughes,* 594 F.Supp. 1353, 1368 (Md. Dist. 1984) ("A pension system need not be actuarially unsound before the legislature may move to change the system and the benefits it provides its members.").

However, the legislature did not stop there. Instead of simply preventing *future* retirees from draining the

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[8] As counsel matter-of-factly stated, "When the numbers started coming in, we went '*whoops.*'"

system, the legislature went one step further by enacting La. R.S. 11:416.1 to retroactively alter the benefits of those state employees who had retired and been reemployed during the few months Act 455 was in effect. I agree with the courts that have held where an enactment appears to be "tailored to modify a particular contractual obligation, rather than to be part of a broad public program which incidentally has the effects of impairing the particular contract," it cannot be deemed to have been reasonable to serve the governmental goal. *United Firefighters of Los Angeles City v. City of Los Angeles,* 210 Cal. App. 3d 1095, 1115, 259 Cal. Rptr. 65 (1989) (citing *Continental Ill. Nat. Bank v. State of Washington,* 696 F.2d 692, 702 (9th Cir. 1983)).[9]

Nevertheless, even assuming that the enactment of La. R.S. 11:416.1 was reasonable, the enactment of La. R.S. 11:416.1 was clearly unnecessary. The necessity prong of the analysis focuses on whether "a less drastic modification" would have been sufficient to achieve the government goals. *United States Trust Company,* 431 U.S. at 29-30, 97 S.Ct. at 1521; *Bailey,* 500 S.E.2d at 67; *East Prince*

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[9] For example, in *Allied Structural Steel Company v. Spannaus,* 438 U.S. 234, 98 S.Ct. 2716 (1978), the Supreme court addressed a statute which subjected private employers of 100 employees or more who provided pension benefits under a plan meeting the qualifications the Internal Revenue Code to a "pension funding charge" if he terminated the plan or closed a Minnesota office. Intended to protect discharged workers, the statute essentially required employers to assure all employees of at least ten years standing a full pension regardless of the vesting provisions of any existing plan. In the end, the Court held that the Minnesota pension law violated the Contract Clause because the State "had not acted to meet an important general social problem. The pension statute had a very narrow focus: it was aimed at specific employers." *Energy Reserves,* 459 U.S. at 412 n.13, 103 S.Ct. at 705 n.13 (explaining its holding in *Allied Structural Steel*).

Frederick Corporation v. Board of County Commissioners, 577 A.2d 27, 30 (Md. 1990); *Fidelity Union Trust Company v. New Jersey Highway Authority,* 426 A.2d 488, 494 (N.J. 1981). As declared by the United States Supreme Court, "[a] State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." *United States Trust Company,* 97 S.Ct. at 1527. Thus, I note with significance that counsel for LASERS conceded at oral arguments that the continued receipt by these 161 plaintiffs of Act 455's benefits, while costly, did not threaten the actuarial soundness of the retirement system. *See Halpin,* 329 N.W.2d at 915 ("That the maintenance of a retirement plan is heavily burdening a governmental unit has not itself been permitted to serve as justification for a scaling down of benefits figuring in the contract. . . . "); *Andrews,* 931 F.Supp. at 1266 ("Although I have no doubt that maintaining the 'actuarial soundness' of the [County Retirement Plan for Appointed and Elected Officials] is an important purpose, the County has failed to make a sufficient showing that the means which it adopted to address its 'problem' is the lease drastic available."). Under these circumstances, I readily find that the enactment of La. R.S 11:416.1 was neither reasonable nor necessary to rectify the problems created by the legislature's own financial miscalculations. *See United Firefighters of Los Angeles,* 210 Cal. App. 3d at 1113 (approving the trial court's conclusion that a "public entity cannot justify the impairment of contractual obligations on the basis of the existence of a fiscal crisis created by its own voluntary act").

CONCLUSION

Because of the lower pay that inevitably comes with public service, the benefits offered through state pension plans are undoubtedly one of the primary reasons state governments can attract and retain better employees. R. Cohn, *Public Employee Retirement Plans – The Nature of Employees' Right,* 1968 Ill. Law Forum 32, 40 (1968). As expressed by the Minnesota Supreme Court, "[r]etirement plans are now an accepted and expected part of one's employment . . . Employees in the public sector undertake employment, at times on less favorable terms than in the private sector, with the expectation that they will have a measure of security in their retirement years." *Christensen v. Minneapolis Municipal Employees Retirement Board,* 331 N.W.2d 740, 747 (Minn. 1983). Closer to home, this point was echoed during the debates surrounding the designation of a "contractual relationship" in LASERS. Delegate Morris explained:

> We are in a position to do something for public employees, and if it's wrong to say that you're entitled to a certain benefit when you retire that you preagree upon, and you have no opportunity not to join the system; you have to join the system . . . But, surely, surely, working people who work on salaries all their life have no opportunities to save much money. Most of the monies that they would save are in a retirement system or in their home, and if they can't be assured in later life when they can't earn or their earning capacity is far below what it was a few years ago, this is the only thing they have to count on. Certainly, I would hope that we would guarantee our state employees that the full faith of the state is behind their retirement system.

IX Records of the Constitutional Convention of 1973: Convention Transcripts, Dec. 5, 1973 at 2578-79. Similarly, Delegate Flory added:

> Let me say this: one of the reasons that the state today can employ personnel is because of the retirement systems that they do have. Certainly the pay that they receive is not commensurate with their counterpart in private industry.

IX Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, Dec. 5, 1973 at 2578.

For these reasons, state supreme courts have moved away from the "gratuity approach" and have begun to protect the expectations of pension plan members. *See* Andrew Mackenzie, *Spiller v. State: Determining the Nature of Public Employees' Rights to Their Pensions,* 46 Me. L. Rev. 355, 358 (1994). As one commentator explains:

> Many states have fully rejected the gratuity theory as outdated. Most of those states now use some form of a *contract theory* to enforce the rights of public employees to their pensions. . . .

Id. at 359 (emphasis added). In my view, this case presents a classical situation for a traditional contract clause analysis, especially in light of the fact that our constitution now expressly designates membership in LASERS to be a "contractual relationship." *See Hargrave, supra,* at page 676 ("the basic approach is to balance the intensity of the individual interest against the intensity of the governmental interest, in the style of the current flexible contracts clause analysis"). Act 455 had to be repealed only ten months after it was enacted because the legislature had underestimated its costs to LASERS. While the legislature acted reasonably in returning the three

irrevocable options, the enactment of La. R.S. 11:416.1, which retroactively altered the pension provisions of plaintiffs who had been induced into retiring by the increase in benefits under Act 455, was neither reasonable nor necessary to maintain the actuarial soundness of the retirement system. Under these facts, I would hold that La. R.S. 11:416.1, as enacted by Act 165 of the 2002 First Extraordinary Session, violates Article X, Section 29(B) of the Louisiana Constitution of 1974.

For the foregoing reasons, I respectfully dissent.

WEIMER, J., dissenting

Weimer, J., dissents for the reasons assigned by Knoll, J.

GREGG SMITH, ET AL.	**DOCKET NO. 495,705 DIV. "D"**
VERSUS	**19TH JUDICIAL DISTRICT COURT**
BOARD OF TRUSTEES OF LOUISIANA STATE EMPLOYEES RETIREMENT SYSTEM	**PARISH OF EAST BATON ROUGE**
	STATE OF LOUISIANA

Filed: _____ _____
DEPUTY CLERK

JUDGMENT

This matter came before the court on June 12, 2002, for trial on the request for preliminary and permanent injunction and request for declaratory judgment;

Present in Court were: Celia R. Cangelosi and Sheri M. Morris, attorneys for Petitioners and Intervenors; and Kevin Torres, attorney for Defendant, Board of Trustees of Louisiana State Employees Retirement System;

The court, upon considering the testimony and exhibits adduced at trial, post trial memoranda and proposed findings of facts and conclusions of law submitted by counsel, jurisprudence, and state and federal constitutions:

IT IS ORDERED, ADJUDGED AND DECREED that La. R.S. 11:416.1 as enacted by Act 165 of the 2002 First Extraordinary Session of the Louisiana Legislature is declared unconstitutional;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the administration, enforcement or implementation of La. R.S. 11:416.1 as enacted by Act 165 (1st E.S. 2002) is permanently enjoined; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, in accordance with La. R.S. 13:5112, the costs of this proceeding paid by the petitioners and intervenors of $849.39 shall be paid by the Defendant, Board of Trustees of Louisiana State Employees Retirement System;

JUDGMENT RENDERED in Open Court on June 26, 2002 and amended on June 27, 2002; JUDGMENT READ AND SIGNED in Baton Rouge on the 1st day of July, 2002.

/s/ Janice Clark
Honorable Janice Clark, Judge
19th Judicial District Court

Judgment Prepared and Submitted by Attorneys:

/s/ Celia R. Cangelosi
CELIA R. CANGELOSI,
La. Bar. No. 12140
918 Government Street,
Suite 101
Post Office Box 3036
Baton Rouge, Louisiana
70821-3036
Phone: (225) 387-0511
Fax: (225) 387-3198

Attorney for Petitioners and Intervenors

/s/ Kevin P. Torres
Kevin P. Torres,
La. Bar No. 12868
General Counsel
Board of Trustees of
Louisiana State
Employees Retirement
System
P.O. Box 44213
8401 United Plaza Blvd.
Baton Rouge, LA
70804-4213
Phone: (225) 922-0652

Attorney for Defendant, Board of Trustees of Louisiana State Employees Retirement System

No. 495-705
Gregg Smith, et al.
vs.
Board of Trustees of LASERS

By agreement of counsel for all parties and with consent of the Court, the following amends, by addition, the text of the oral reasons assigned in this matter on Wednesday, June 26, 2002. (Amending text emphasized.)

"This is Gregg Smith, et al. v. Board of Trustees of Louisiana State Employees Retirement System, No. 495-705. The Court has carefully reviewed this matter, together with the exhibits adduced at the trial of the cause, the testimony, post-trial memoranda, and also the proposed finding of facts and conclusions of law submitted herewith by the parties through counsel, as well as the jurisprudence of this state, the constitution of this state, the Constitution of the United States of America, and the Fourteenth Amendment. The Court is of the opinion that **La.R.S.11:416.1 as enacted by** Act 165 of the Extra Ordinary Session of 2002 is constitutionally infirm in that it is violative of Article I, Section 10 of the United States Constitution and Article I, Section 23 of the Louisiana Constitution and Article X, Section 29 of the Louisiana Constitution, as well as the Fourteenth Amendment. The Court will issue formal reasons hereinafter upon motion by counsel, and at this juncture, in accordance with the stipulation, grants a permanent injunction to the enforcement of the statute. Judgment to be signed accordingly." Notify counsel (D. Martin, Thurs. 6-27-02)

Supreme Court of Louisiana

On the **5th day of September, 2003**, the following action was taken by the Supreme Court of Louisiana in the case listed:

REHEARING DENIED:

2002-CA-2161 GREGG SMITH, ET AL v. BOARD OF TRUSTEES OF LOUISIANA STATE EMPLOYEES' RETIREMENT SYSTEM (Parish of E. Baton Rouge) KNOLL, J., would grant a rehearing. WEIMER, J., would grant a rehearing.

GREGG SMITH, ET AL.	**DOCKET NO. 495,705 DIV. "D"**
VERSUS	**19TH JUDICIAL DISTRICT COURT**
BOARD OF TRUSTEES OF LOUISIANA STATE EMPLOYEES RETIREMENT SYSTEM	**PARISH OF EAST BATON ROUGE**
	STATE OF LOUISIANA

JUDGMENT

Considering the Decree of the Louisiana Supreme Court in the matter entitled "Smith, et al vs. Board of Trustees of Louisiana State Employees' Retirement System" and bearing Docket No. 2002-CA-2161 thereof;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Judgment rendered by this Court on June 26 and 27, 2003, which Judgment was signed on July 1, 2003, and which Judgment declared La. R.S. 11:416.1 to be unconstitutional, is reversed by a 5 to 2 vote ~~Decree~~ of the Louisiana Supreme Court;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the permanent injunction contained in the aforementioned judgment, permanently enjoining the administration, enforcement or implementation of La. R.S. 11:416.1 as enacted by Act 165 (1st E.S. 2002), is reversed by a 5 to 2 vote ~~Decree~~ of the Louisiana Supreme Court;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each plaintiff or intervenor is hereby afforded thirty days from the date of signing of this Judgment

or through the 5th day of November, 2003, to select any of the four options set forth in La. R.S. 11:416.1;

JUDGMENT READ, RENDERED AND SIGNED at Baton Rouge, Louisiana, this 6th day of October, 2003.

/s/ Janice Clark
JANICE G. CLARK, JUDGE
NINETEENTH JUDICIAL
DISTRICT COURT

La. Const. Art. 10, § 29

§ 29. Retirement and Survivor's Benefits

* * *

(B) Other Officials and Employees. The legislature shall enact laws providing for retirement of officials and employees of the state, its agencies, and its political subdivisions, including persons employed jointly by state and federal agencies other than those in military service, through the establishment of one or more retirement systems. Membership in any retirement system of the state or of a political subdivision thereof shall be a contractual relationship between employee and employer, and the state shall guarantee benefits payable to a member of a state retirement system or retiree or to his lawful beneficiary upon his death.

* * *

(E)(5) All assets, proceeds, or income of the state and statewide public retirement systems, and all contributions and payments made to the system to provide for retirement and related benefits shall be held, invested as authorized by law, or disbursed as in trust for the exclusive purpose of providing such benefits, refunds, and administrative expenses under the management of the boards of trustees and shall not be encumbered for or diverted to any other purpose. The accrued benefits of members of any state or statewide public retirement system shall not be diminished or impaired. Future benefit provisions for members of the state and statewide public retirement systems shall only be altered by legislative enactment.

ACT 455
ENROLLED

Regular Session, 2001

HOUSE BILL NO. 1396

BY REPRESENTATIVE SCHNEIDER

AN ACT

To amend and reenact R.S. 11:416, relative to the Louisiana State Employees' Retirement System; to provide with respect to the reemployment of retirees, including but not limited to the benefits payable to such retirees, the deletion of certain earnings limitations, and the reporting requirements that apply upon reemployment; to provide an effective date; and to provide for related matters.

Notice of intention to introduce this Act has been published as required by Article X, Section 29(C) of the Constitution of Louisiana.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 11:416 is hereby amended and reenacted to read as follows:

§416. Employment of retirees

A. ~~Regardless of age, if a retiree of this system is engaged or hereafter engages in employment which otherwise would render him eligible~~*

---

* CODING: Words in ~~struck through~~ type are deletions from existing law; words underscored are additions.

~~for membership in this system, he shall choose one of the following irrevocable options:~~

~~(1)(a) Option 1. Any person on regular retirement under the Louisiana State Employees' Retirement System may be employed in any position covered by this system during any fiscal year, provided that his earnings in such employment do not exceed fifty percent of his annual retirement benefit for such fiscal year. For the purposes of this Section, there shall be an annual cost-of-living adjustment to the annual retirement benefit figure used in these computations. This cost-of-living adjustment shall be based upon and directly reflect the annual percentage increase or decrease in the Consumer Price Index for the preceding year. The retiree may continue to receive his benefit until he earns more than fifty percent of his annual retirement benefit as defined herein, during any fiscal year, after which his retirement benefit as defined herein, during any fiscal year, after which his retirement benefits shall be reduced so that the total reduction equals the amount earned in excess of fifty percent of his annual retirement benefit as adjusted under this Section. Retirees choosing this option shall not become contributing members of this system.~~

~~(b) Due to inconsistent interpretations arising from the passage of Act 610 of the 1995 Regular Session, which made the selection of Option 1 an irrevocable decision, the benefits of any retiree of the Department of Transportation and Development who chose Option 1 shall not be reduced or suspended as a consequence of any employment occurring during the period between July 1, 1995 and June 30, 1997.~~

~~(c) Notwithstanding the provisions of this Section or any other provision of law to the contrary, any retiree of this system who has at least thirty years of service credited to his account and is at least age seventy shall be exempt from any suspension or reduction of benefits received from this system as the result of reemployment.~~

~~(2) Option 2.(a) The retiree may regain membership by repaying all retirement benefits received from this system, plus interest at the actuarial rate approved by the board of trustees of this system thereon compounded annually from date of receipt until paid. In addition, the retiree shall pay into the system an amount equal to the employee and employer contributions which would have been paid had the retiree become a member at the commencement of the resumption of covered employment, plus interest at the actuarial rate thereon compounded annually from date of service until paid. Upon such regaining of membership, he shall have restored to his credit all service standing to his credit at the time of retirement and shall receive service credit for all service rendered since becoming so reemployed and thereafter shall be subject to the same conditions as are other members of the system which are not in conflict herewith.~~

~~(b) Notwithstanding any other provision of law to the contrary, if a retiree of this system engages in employment which renders him eligible for membership in any public retirement system other than this system, he may regain membership in this system for the sole and exclusive purpose of transferring all service credited to his account in this system to the system covering such other employment by repaying all retirement benefits received from this system plus~~

~~interest at the actuarial rate approved by the board of trustees of this system thereon compounded annually from date of receipt until paid. Upon such regaining of membership, he shall have restored to his credit all service standing to his credit at the time of retirement. Upon such restoration of credit, the member shall immediately transfer his credit to the other public retirement system, subject to the provisions of R.S. 11.143, except the provision set forth in R.S. 11.143(A) requiring six months of membership in the receiving system, and provided that any such transfer under the provisions of this Subparagraph shall be executed on or before October 1, 1997, after which restoration of membership and transfer of credit shall not be authorized under the provisions of this Subparagraph.~~

~~(3) Option 3. The retiree may request immediate suspension of his benefit and become a member of this system, effective on the first day of reemployment. Upon such regaining of membership, he shall contribute thereafter at the current contribution rate as applicable to his position. Upon subsequent retirement, his suspended retirement allowance shall be restored to full force and effect. In addition, if he has worked and contributed for at least thirty-six months, his retirement allowance shall be increased by an amount attributable to his service and average compensation since reemployment based on the computation formula in effect at the time of subsequent retirement. If he has been reemployed for a period less than thirty-six months, upon termination of reemployment the contributions paid by the retiree since his reemployment shall, upon application, be refunded to the retiree. In no event shall the~~

~~member receive duplicate credit for unused sick and annual leave that had been included in the computation of his original retirement allowance. Any supplemental benefit shall be based on reemployment service credit only and shall not include any other specific amount which may otherwise be provided in the regular retirement benefit computation formula. In the event of the member's death prior to subsequent retirement, payment of benefits to the designated beneficiary or survivor shall be in accordance with the option selected by the member at the time of his original retirement. No change in the option originally selected by the member shall be permitted except as provided in R.S. 11.446(C). In no event shall the supplemental benefit exceed an amount which, when combined with the original benefit, equals one hundred percent of the average compensation figure used to compute the supplemental benefit. Under no circumstances shall any person who has regained membership pursuant to the provisions of this Paragraph be allowed to purchase service credit for any period employed in the state service during which he continued to draw his retirement allowance.~~ Any retiree shall be eligible to be reemployed by any employer agency in a position covered by the retirement system without a suspension of benefits, provided the retiree has been retired for a period of at least twelve months from the effective date of his retirement. The twelve-month period that occurs immediately following the effective date of retirement of each retiree, shall be known as the "waiting period".

B. The retiree and the appointing authority of the employer agency covered by this system shall immediately notify the system of the

retiree's date of employment, ~~the option selected for reemployment purposes,~~ the amount of his starting salary, any subsequent changes in salary, ~~the estimated duration of employment,~~ and the date of termination of employment.

C.(1)(a)(i) ~~Should any employer covered by the retirement system employ a retiree and fail to submit the report required by Subsection B of this Section, the retiree shall be considered as returning to active service under the provisions of Option 3 above. His retirement benefit shall be suspended during such active service and he shall be governed by the provisions of this Section.~~ If any employer agency covered by the retirement system employs a retiree within the waiting period, then the benefits of the retiree shall be suspended for twelve months.

(ii) The twelve months of suspended benefits shall occur regardless of whether the suspension occurs during twelve consecutive months or during twelve joined months where there are multiple periods of such reemployment.

(b)(i) Upon reemployment of a retiree, the employer shall remit employer contributions to this system based on the employer contribution rate that applies to the reemployed retiree's position on the date of such reemployment. Additionally, the employer shall withhold employee contributions from the reemployed retiree's compensation based on the employee contribution rate that applies to the reemployed retiree's position on the date of such reemployment and remit such contributions to this system.

(ii) Upon termination of reemployment, if the reemployed retiree had worked and contributed to the system for at least thirty-six months, then his retirement allowance shall be increased by an amount that is attributable to the service that occurred during reemployment and the average compensation that is calculated for the period of such reemployment. The increased retirement allowance shall be calculated based upon the provisions of this Chapter that are in effect on the date of reemployment. In no event shall such a retiree's original retirement allowance, when combined with the increased retirement allowance, exceed the average compensation which is calculated for the period of reemployment.

(iii) Upon termination of reemployment, if the reemployed retiree had worked and contributed to the system for less than thirty-six months, then the employee contributions paid during the period of reemployment shall, upon application, be refunded to the retiree.

(c) Any retiree who is employed by an employer agency covered by this system on June 30, 2001, shall be exempt from the suspension of benefits, without regard to whether the retiree's effective date of reemployment occurred during the waiting period.

(2) Employers ~~and employees~~ failing to submit the report required by Subsection B of this Section shall be liable for the repayment of contributions due to the system from the date of reemployment until such time as the report is filed.

Section 2. This Act shall become effective on June 30, 2001; if vetoed by the governor and subsequently approved by the legislature, this Act shall become effective on June 30, 2001, or on the day following such approval by the legislature, whichever is later.

/s/ Charles DeWitt
SPEAKER OF THE HOUSE OF REPRESENTATIVES

/s/ John J. Hainkel, Jr.
PRESIDENT OF THE SENATE

/s/ M.J. Foster, Jr.
GOVERNOR OF THE STATE OF LOUISIANA

APPROVED: 6/21/01
Teri Ricks

La. R.S. 11:416, as amended by Act 455 (2001)

§ 416. Employment of retirees

A. Any retiree shall be eligible to be reemployed by any employer agency in a position covered by the retirement system without a suspension of benefits, provided the retiree has been retired for a period of at least twelve months from the effective date of his retirement. The twelve-month period that occurs immediately following the effective date of retirement of each retiree, shall be known as the "waiting period".

B. The retiree and the appointing authority of the employer agency covered by this system shall immediately notify the system of the retiree's date of employment, the amount of his starting salary, any subsequent changes in salary, and the date of termination of employment.

C. (1)(a)(i) If any employer agency covered by the retirement system employs a retiree within the waiting period, then the benefits of the retiree shall be suspended for twelve months.

(ii) The twelve months of suspended benefits shall occur regardless of whether the suspension occurs during twelve consecutive months or during twelve joined months where there are multiple periods of such reemployment.

(b)(i) Upon reemployment of a retiree, the employer shall remit employer contributions to this system based on the employer contribution rate that applies to the reemployed retiree's position on the date of such reemployment. Additionally, the employer shall withhold employee contributions from the reemployed retiree's compensation based on the employee contribution rate that applies to the

reemployed retiree's position on the date of such reemployment and remit such contributions to this system.

(ii) Upon termination of reemployment, if the reemployed retiree had worked and contributed to the system for at least thirty-six months, then his retirement allowance shall be increased by an amount that is attributable to the service that occurred during reemployment and the average compensation that is calculated for the period of such reemployment. The increased retirement allowance shall be calculated based upon the provisions of this Chapter that are in effect on the date of reemployment. In no event shall such a retiree's original retirement allowance, when combined with the increased retirement allowance, exceed the average compensation which is calculated for the period of reemployment.

(iii) Upon termination of reemployment, if the reemployed retiree had worked and contributed to the system for less than thirty-six months, then the employee contributions paid during the period of reemployment shall, upon application, be refunded to the retiree.

(c) Any retiree who is employed by an employer agency covered by this system on June 30, 2001, shall be exempt from the suspension of benefits, without regard to whether the retiree's effective date of reemployment occurred during the waiting period.

(2) Employers failing to submit the report required by Subsection B of this Section shall be liable for the repayment of contributions due to the system from the date of reemployment until such time as the report is filed.

ACT 165
ENROLLED

First Extraordinary Session, 2002

HOUSE BILL NO. 130

BY REPRESENTATIVES SCHNEIDER, DEWITT, DANIEL, AND FRITH

AN ACT

To amend and reenact R.S. 11:416 and to enact R.S. 11:416.1, relative to the Louisiana State Employees Retirement System; to provide for the reemployment of retirees; to provide for the benefits paid to such retirees; to provide relative to accrual of credit for service; to provide for employer contributions; to provide an option for regaining membership in the system; to provide for reporting; to provide penalties for failure to report; to provide for retirees reemployed pursuant to Act No. 455 of the 2001 Regular Session of the Legislature and for employees who retired prior to the effective date of such Act; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 11:416 is hereby amended and reenacted and R.S. 11:416.1 is hereby enacted to read as follows:

§416. Employment of retirees

A. ~~Any retiree shall be eligible to be reemployed by any employer agency in a position covered by the retirement system without a suspension of benefits, provided the retiree has been retired for a period of at least twelve*~~

* CODING: Words in ~~struck through~~ type are deletions from existing law; words underscored are additions.

~~months from the effective date of his retirement. The twelve-month period that occurs immediately following the effective date of retirement of each retiree, shall be known as the "waiting period".~~ Regardless of age, if a retiree of the system is engaged or hereafter engages in employment which otherwise would render him eligible for membership in the system, he shall choose one of the following irrevocable options:

(1)(a) Option 1. Any person on regular retirement under the Louisiana State Employees' Retirement System may be employed in any position covered by the system during any fiscal year, provided that his earnings in such employment do not exceed fifty percent of his annual retirement benefit for such fiscal year. For the purposes of this Section, there shall be an annual cost-of-living adjustment to the annual retirement benefit figure used in these computations. This cost-of-living adjustment shall be based upon and directly reflect the annual percentage increase or decrease in the Consumer Price Index for all Urban Consumers for the preceding year. The retiree may continue to receive his benefit until he earns more than fifty percent of his annual retirement benefit as defined herein, during any fiscal year, after which his retirement benefits shall be reduced so that the total reduction equals the amount earned in excess of fifty percent of his annual retirement benefit as adjusted under this Section. Retirees choosing this option shall not become contributing members of this system.

(b) Notwithstanding the provisions of this Section or any other provision of law to the contrary, any retiree of this system who has at least thirty years of service credited to his account and is at least age seventy shall be exempt from any suspension or reduction of benefits received from this system as the result of reemployment.

(2) Option 2.(a) The retiree may regain membership by repaying all retirement benefits received from this system, plus interest thereon at the actuarial rate approved by the board of trustees of this system compounded annually from date of receipt until paid. In addition, the retiree shall pay into the system an amount equal to the employee and employer contributions which would have been paid had the retiree become a member at the commencement of the resumption of covered employment, plus interest thereon at the actuarial rate compounded annually from date of service until paid. Upon such regaining of membership, he shall have restored to his credit all service standing to his credit at the time of retirement and shall receive service credit for all service rendered since becoming so reemployed and thereafter shall be subject to the same conditions as are other members of the system which are not in conflict herewith.

(3) Option 3. The retiree may request immediate suspension of his benefit and become a member of this system, effective on the first day of reemployment. Upon such regaining of membership, he shall contribute thereafter at the current contribution rate as applicable to his position. Upon subsequent retirement, his suspended retirement allowance shall be restored to full force and effect. In addition, if he has worked and contributed for at least thirty-six months,

his retirement allowance shall be increased by an amount attributable to his service and average compensation since reemployment based on the computation formula in effect at the time of subsequent retirement. If he has been reemployed for a period less than thirty-six months, upon termination of reemployment the contributions paid by the retiree since his reemployment shall, upon application, be refunded to the retiree. In no event shall the member receive duplicate credit for unused sick and annual leave that had been included in the computation of his original retirement allowance. Any supplemental benefit shall be based on reemployment service credit only and shall not include any other specific amount which may otherwise be provided in the regular retirement benefit computation formula. In the event of the member's death prior to subsequent retirement, payment of benefits to the designated beneficiary or survivor shall be in accordance with the option selected by the member at the time of his original retirement. No change in the option originally selected by the member shall be permitted except as provided in R.S. 11:446(C). In no event shall the supplemental benefit exceed an amount which, when combined with the original benefit, equals one hundred percent of the average compensation figure used to compute the supplemental benefit. Under no circumstances shall any person who has regained membership pursuant to the provisions of this Paragraph be allowed to purchase service credit for any period employed in the state service during which he continued to draw his retirement allowance.

B. The retiree and the appointing authority of the employer agency covered by ~~this~~ the system

shall immediately notify the system of the retiree's date of employment, the option selected for reemployment purposes, the amount of his starting salary, any subsequent changes in salary, the estimated duration of employment, and the date of termination of employment.

C.~~(1)(a)(i) If any employer agency covered by the retirement system employs a retiree within the waiting period, then the benefits of the retiree shall be suspended for twelve months.~~

~~(ii) The twelve months of suspended benefits shall occur regardless of whether the suspension occurs during twelve consecutive months or during twelve joined months where there are multiple periods of such reemployment.~~

~~(b)(i) Upon reemployment of a retiree, the employer shall remit employer contributions to this system based on the employer contribution rate that applies to the reemployed retiree's position on the date of such reemployment. Additionally, the employer shall withhold employee contributions from the reemployed retiree's compensation based on the employee contribution rate that applies to the reemployed retiree's position on the date of such reemployment and remit such contributions to this system.~~

~~(ii) Upon termination of reemployment, if the reemployed retiree had worked and contributed to the system for at least thirty-six months, then his retirement allowance shall be increased by an amount that is attributable to the service that occurred during reemployment and the average compensation that is calculated for the period of such reemployment. The increased retirement allowance shall be calculated based~~

~~upon the provisions of this Chapter that are in effect on the date of reemployment. In no event shall such a retiree's original retirement allowance, when combined with the increased retirement allowance, exceed the average compensation which is calculated for the period of reemployment.~~

~~(iii) Upon termination of reemployment, if the reemployed retiree had worked and contributed to the system for less than thirty-six months, then the employee contributions paid during the period of reemployment shall, upon application, be refunded to the retiree.~~

~~(c) Any retiree who is employed by an employer agency covered by this system on June 30, 2001, shall be exempt from the suspension of benefits, without regard to whether the retiree's effective date of reemployment occurred during the waiting period.~~

~~(2) Employers failing to submit the report required by Subsection B of this Section shall be liable for the repayment of contributions due to the system from the date of reemployment until such time as the report is filed.~~ Should any employer covered by the system employ a retiree and fail to submit the report required by Subsection B of this Section, the retiree shall be considered as returning to active service under the provisions of Option 3 above. His retirement benefit shall be suspended during such active service and he shall be governed by the provisions of this Section. Employers and employees failing to submit the report required by Subsection B of this Section shall be liable for the repayment of contributions due from the date of reemployment.

§416.1. Reemployment of retirees under Act No. 455 of the 2001 Regular Session

A retiree who retired under the provisions of Act No. 455 of the 2001 Regular Session and was rehired prior to the effective date of this Section in employment which otherwise would render him eligible for membership in the system shall choose one of the following irrevocable options:

(1) Option 1 as provided in R.S. 11:416(A).

(2) Option 2 as provided in R.S. 11:416(A).

(3) Option 3 as provided in R.S. 11:416(A).

(4) Option 4. At the request of the retiree his retirement benefits shall be suspended for twelve months following the effective date of his retirement or until his reemployment ends, whichever occurs first. The retiree shall receive his retirement benefits after such suspension, but he shall accrue no additional service credit during reemployment. Under this option, neither the retiree nor the employer shall make any contribution to the system.

Section 2. R.S. 11:416.1 as enacted by Section 1 of this Act shall be applicable to any person who retired on or after June 30, 2001. Within thirty days after the effective date of this Act, any person who retired under the provisions of Act No. 455 of the 2001 Regular Session of the Legislature and was rehired before the effective date of this Act shall choose one of the Options provided in Section 1 of this Act. Should any such person fail to make a choice within the thirty-day period, the retiree shall be considered as returning to active service under Option 3 as provided in Section 1 of this Act. However, this Act shall

have no effect upon any person who retired prior to the effective date of Act No. 455 of the 2001 Regular Session of the Legislature who is reemployed and receiving retirement benefits when this Act becomes effective and such person shall continue to receive such retirement benefits.

Section 3.A. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

B. Should the application of the provisions of R.S. 11:416.1 as enacted in Section 1 of this Act to those persons who retired under Act No. 455 of the 2001 Regular Session of the Legislature and were rehired be held invalid, any member of that group may elect to rescind his retirement voluntarily and regain membership in the system. Upon such regaining of active membership, all service that was credited to the retiree at the time of his retirement shall be restored to his credit and he shall receive service credit for all of his service since becoming reemployed. Thereafter the member shall be subject to all conditions that apply to other members of the system as if he had never retired.

C. If a person wishing to rescind his retirement as provided in Subsection B above has had a break in service after retirement, he shall repay to the system an amount equal to the employee and employer contributions which would have been paid had he been an active member of the system during such break in service plus interest thereon at the actuarial rate compounded annually from the date of reemployment until paid. He shall also repay any

retirement benefits he received during the break in service plus interest thereon at the actuarial rate compounded annually from the date of reemployment until paid. The person shall receive service credit for the time period represented by the break in service for which he repays the value of the employee and employer contributions.

Section 4. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided in Article III, Section 18 of the Constitution of Louisiana. If vetoed by the governor and subsequently approved by the legislature, this Act shall become effective on the day following such approval.

/s/ Charles DeWitt
SPEAKER OF THE HOUSE OF REPRESENTATIVES

/s/ John J. Hainkel, Jr.
PRESIDENT OF THE SENATE

GOVERNOR OF THE STATE OF LOUISIANA

APPROVED:

Not Signed.
/s/ T. Ryder

La. R.S. 11:416,
as amended by Act 165 (1st E.S. 2002)

§ 416. Employment of retirees

A. Regardless of age, if a retiree of the system is engaged or hereafter engages in employment which otherwise would render him eligible for membership in the system, he shall choose one of the following irrevocable options:

(1)(a) Option 1. Any person on regular retirement under the Louisiana State Employees' Retirement System may be employed in any position covered by the system during any fiscal year, provided that his earnings in such employment do not exceed fifty percent of his annual retirement benefit for such fiscal year. For the purposes of this Section, there shall be an annual cost-of-living adjustment to the annual retirement benefit figure used in these computations. This cost-of-living adjustment shall be based upon and directly reflect the annual percentage increase or decrease in the Consumer Price Index for all Urban Consumers for the preceding year. The retiree may continue to receive his benefit until he earns more than fifty percent of his annual retirement benefit as defined herein, during any fiscal year, after which his retirement benefits shall be reduced so that the total reduction equals the amount earned in excess of fifty percent of his annual retirement benefit as adjusted under this Section. Retirees choosing this option shall not become contributing members of this system.

(b) Notwithstanding the provisions of this Section or any other provision of law to the contrary, any retiree of the system who has at least thirty years of service credited to his account and is at least age seventy shall be exempt

from any suspension or reduction of benefits received from this system as the result of reemployment.

(2) Option 2. The retiree may regain membership by repaying all retirement benefits received from the system, plus interest thereon at the actuarial rate approved by the board of trustees of the system compounded annually from date of receipt until paid. In addition, the retiree shall pay into the system an amount equal to the employee and employer contributions which would have been paid had the retiree become a member at the commencement of the resumption of covered employment, plus interest thereon at the actuarial rate compounded annually from date of service until paid. Upon such regaining of membership, he shall have restored to his credit all service standing to his credit at the time of retirement and shall receive service credit for all service rendered since becoming so reemployed and thereafter shall be subject to the same conditions as are other members of the system which are not in conflict herewith.

(3) Option 3. The retiree may request immediate suspension of his benefit and become a member of this system, effective on the first day of reemployment. Upon such regaining of membership, he shall contribute thereafter at the current contribution rate as applicable to his position. Upon subsequent retirement, his suspended retirement allowance shall be restored to full force and effect. In addition, if he has worked and contributed for at least thirty-six months, his retirement allowance shall be increased by an amount attributable to his service and average compensation since reemployment based on the computation formula in effect at the time of subsequent retirement. If he has been reemployed for a period less than thirty-six months, upon termination of reemployment

the contributions paid by the retiree since his reemployment shall, upon application, be refunded to the retiree. In no event shall the member receive duplicate credit for unused sick and annual leave that had been included in the computation of his original retirement allowance. Any supplemental benefit shall be based on reemployment service credit only and shall not include any other specific amount which may otherwise be provided in the regular retirement benefit computation formula. In the event of the member's death prior to subsequent retirement, payment of benefits to the designated beneficiary or survivor shall be in accordance with the option selected by the member at the time of his original retirement. No change in the option originally selected by the member shall be permitted except as provided in R.S. 11:446(C). In no event shall the supplemental benefit exceed an amount which, when combined with the original benefit, equals one hundred percent of the average compensation figure used to compute the supplemental benefit. Under no circumstances shall any person who has regained membership pursuant to the provisions of this Paragraph be allowed to purchase service credit for any period employed in the state service during which he continued to draw his retirement allowance.

B. The retiree and the appointing authority of the employer agency covered by the system shall immediately notify the system of the retiree's date of employment, the option selected for reemployment purposes, the amount of his starting salary, any subsequent changes in salary, the estimated duration of employment, and the date of termination of employment.

C. Should any employer covered by the system employ a retiree and fail to submit the report required by

Subsection B of this Section, the retiree shall be considered as returning to active service under the provisions of Option 3 above. His retirement benefit shall be suspended during such active service and he shall be governed by the provisions of this Section. Employers and employees failing to submit the report required by Subsection B of this Section shall be liable for the repayment of contributions due from the date of reemployment.

La. R.S. 11:416.1

§ 416.1. Reemployment of retirees under Act No. 455 of the 2001 Regular Session

A retiree who retired under the provisions of Act No. 455 of the 2001 Regular Session and was rehired prior to the effective date of this Section in employment which otherwise would render him eligible for membership in the system shall choose one of the following irrevocable options:

(1) Option 1 as provided in R.S. 11:416(A).

(2) Option 2 as provided in R.S. 11:416(A).

(3) Option 3 as provided in R.S. 11:416(A).

(4) Option 4. At the request of the retiree his retirement benefits shall be suspended for twelve months following the effective date of his retirement or until his reemployment ends, whichever occurs first. The retiree shall receive his retirement benefits after such suspension, but he shall accrue no additional service credit during reemployment. Under this option, neither the retiree nor the employer shall make any contribution to the system.

LIST OF PETITIONERS

Elva Adams, Gladys Antoine, Darrell Lee Augustine, Donald Barr, John R. Barton, Dorothy M. Bell, Sherman Bell, Sr., Jody Bendily, Margaretta Blades, Courtney Blakeman, Ronald D. Boies, Kenneth E. Booty, Robert L. Bowen, Johnnie Bowman, Darren Bordelon, Arthur C. Brabham, Jr., Nathan Brecheen, Terry R. Bridges, Glynn Brown, Robert H. Butler, Jr., David Cagnolatti, Burl Cain, Anson (Brad) Carpenter, Alice J. Carson, Martha R. Carter, Clifton L. Chaney, Michael W. Chaney, John T. Chase, Frank W. Christman, David Youl Clouse, Shirley Coody, Bruce Coston, Dale J. Couvillion, Judith Arleen Curry, Fred A. Day, Nathan Desselle, Alvin J. Dupre, Jr., Roy P. Dwyer, Jr., Michael Eby, Randall Harris Escue, Louis P. Fakier, James A. Felker, Warren Foster, Ronnie J. Fruge', Jeffrey Gaspard, Willard Gauthier, Tillman Givens, Jr., Cecil E. Goudeau, Jr., Willie Greer, James E. Guillory, Roxy Haltom, Narviree W. Harden, James Harris, Joe Louis Harris, Lionel Harris, Sr., Eddie M. Hattaway, Henry Hawkins, Martha Haynes, Michael Hebert, Robert Y. Henderson, Cathy Veronica Henry, Charles A. Hester, Charles Honeycutt, Harry L. Hooker, Helen Horton, Cornel H. Hubert, Sr., Earnest Jeffery, Jr., Henry Jenkins, Frank Johnson, Gregory N. Johnson, Kenneth Johnson, David T. Jones, Guy G. Jones, Susan Foster Kean, Billie J. Klein, Charles J. Klopf, Jr., Angela T. Koenig, Sue Traylor Larisey, Jimmy LeBlanc, Irinton James Lee, Jr., Mariana Leger, Luke F. Lensing, James H. Leslie, Carolyn B. Lewis, Roy L. London, Raymond L. McNeil, Loretha R. Malveo, Joseph P. Mayeaux, Robert L. Mays, William Mealey, Elizabeth M. Meng, Katherine J. Minor, William Douglas Mount, Patricia Murphy, Leroy Nelson, Joe L. Norwood, Jr., James P. Patin, Kenneth R. Pickett, Claude R. Price, Sr., Fulton Rabalais, James D.

Rabalais, Herbert Ragle, Charles J. Recatto, Lula Richardson, Harold Robinson, III, Curtis Rogers, James L. Rogers, William Rogers, Myra Alyce D. Roper (Wyche), William A. Ross, Charles Rowan, Jerry Sharp, Mack Shaw, Harvey Slater, Gregg Smith, Samuel Smith, Jr., Louis W. Stacks, Gerald W. Starks, Charles Stewart, Kenneth P. Stewart, Roscoe Straughter, Cathy Stroud, Valrie K. Tannehill, Rayburin Lewis Teer, Larry E. Thomas, Steven Lane Thomas, Bobby Thornton, Jeffry Tircuit, Timothy Tircuit, Joseph M. Turner, Darryl Vannoy, Kendal Varner, Ann Vick, Michael A. Vincent, Ray Vittorio, Doris Wagner, Claude A. Waller, Jacqueline Faye Warner, Richard D. Weidenhaft, Tyrone White, Kenneth Mason Wilkes, Jerry W. Williams, Sheila Severin Williams, Billie Barnett Wilson, Corlis S. Woods, Emmett G. Wyche, Jr., Michael D. Wynne, James M. Yarbrough, Arlena M. Zeigler.

(2)

No. 03-813

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In The

Supreme Court of the United States

GREGG SMITH, ET AL.,

Petitioners,

versus

BOARD OF TRUSTEES OF THE LOUISIANA STATE EMPLOYEES' RETIREMENT SYSTEM,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS E. BALHOFF
(Bar Roll No. 2716)
Counsel of Record
JUDITH R. ATKINSON
(Bar Roll No. 17240)
ROEDEL, PARSONS, KOCH, BLACHE, BALHOFF & MCCOLLISTER
8440 Jefferson Highway, Suite 301
Baton Rouge, LA 70809-7652
Phone: (225) 929-7033
Fax: (225) 928-4925
Counsel for Respondent, Board of Trustees for the Louisiana State Employees' Retirement System

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

The plaintiffs are 161 employees of the Louisiana Department of Public Safety and Corrections who filed suit against the Board of Trustees of the Louisiana State Employees' Retirement System under the Contract Clause of both the U.S. and Louisiana Constitutions. They claimed that they had retired and then were reemployed, and should have been entitled under La. R.S. 11:416, as amended by Act 455 (2001), to receive full salary, full retirement benefits after a twelve-month waiting period, continued membership in the state retirement system, and a supplemental retirement after reemployment for at least thirty-six months.

The statutory law setting forth the retirement benefits for qualified Louisiana state employee retirees is found in La. R.S. 11:401, *et seq*. The retirement system is described in that statute and is known as the Louisiana State Employees' Retirement System ("LASERS"). Upon meeting the age and service requirements set forth in the statute, a state employee acquires a "vested right" as defined in La. R.S. 11:403(33). Upon "retirement," as defined in La. R.S. 11:403(24), retirees terminating from active service can choose to be paid in accord with one of the payment options set forth in La. R.S. 11:446. This state retirement system has been in effect for many years.

If a retiree becomes reemployed by the State, the effect of the retiree's reemployment on his retirement benefits is spelled out in La. R.S. 11:416. Prior to June 30, 2001, three options were available: Under Option 1, a reemployed retiree could continue to receive his full retirement benefits until he earned more than fifty percent of his annual allowance. After that point, a reemployed retiree's

benefits were reduced by the amount he earned in excess of fifty percent. A retiree who chose this option could not become a contributing member of LASERS. Option 2 allowed the reemployed retiree to rejoin LASERS by repayment of retirement benefits previously received, with interest. This person was then considered as having never retired. Option 3 allowed the reemployed retiree to request immediate suspension of his benefits and become a member of LASERS as of the first day of reemployment. This allowed the reemployed retiree to earn a supplemental retirement benefit based upon the new employment on the condition the person worked for at least thirty-six months. Under none of these options could a reemployed retiree draw a full salary and full retirement benefits.

Act 455, passed by the Louisiana legislature, amended La. R.S. 11:416 effective June 30, 2001. This Act liberalized the provision by allowing a reemployed retiree to receive both a full salary and full retirement benefits provided he had been retired for a period of at least twelve months, referred to as the "waiting period." The reemployed retiree could also continue to earn credit during his reemployment toward a supplemental retirement benefit if employed for at least an additional thirty-six months. In what appears to be an obvious attempt to treat all reemployed retirees the same, the legislature provided in Act 455 that a reemployed retiree who returned to work earlier than twelve months could still receive his full retirement benefits once the twelve-month waiting period had elapsed.

Plaintiffs, all of whom were eligible for retirement under the state retirement system's age and service requirements, recognized what amounted to a loophole and potential windfall afforded to them by Act 455. If they

retired, and then were rehired, they could receive two income checks (a full salary check and a full retirement benefits check), instead of only one or the other, with the mere passage of the twelve-month waiting period, and they could continue to participate in the state retirement system. Plaintiffs, with the obvious cooperation of certain management employees at the Department of Public Safety and Corrections, signed papers where they allegedly retired on a Friday, and then on that same Friday, signed papers where they were rehired effective the following Monday.

The State legislature responded by passing Act 165 (2002), which enacted La. R.S. 11:416.1, repealing Act 455, reinstating the three options which were available prior to June 30, 2001, and making available a fourth option allowing a reemployed retiree to receive his full salary and full retirement benefits after the twelve-month waiting period but providing that the reemployed retiree "shall accrue no additional service credit during reemployment."[1] Act 165 became effective May 9, 2002.

None of the four options under La. R.S. 11:416.1 permits plaintiffs to receive a full salary, full retirement benefits, and earn a supplemental retirement benefit during reemployment. For instance, under Option 3, plaintiffs can not receive retirement benefits after the

[1] Option 4 allows a reemployed retiree to receive two income checks, a full salary and full retirement benefits after the twelve month waiting period elapses, just as was the case in Act 455. However, under Option 4 a reemployed retiree can not accrue credit towards supplemental retirement benefits (assuming he remains reemployed for at least thirty-six months) if he chooses to draw full retirement benefits.

twelve-month waiting period. The retirement benefits remain suspended during reemployment. Under Option 4, plaintiffs can receive full retirement benefits after the twelve-month waiting period, but can not earn supplemental retirement benefits even when reemployed for at least thirty-six months.

Plaintiffs, in their suit, claim that La. R.S. 11:416.1 required them to select an option which would result in diminishing or impairing benefits which previously existed under Act 455 in violation of the Contract Clauses of the U.S. and Louisiana Constitutions. Defendant answered that none of the plaintiffs had been reemployed for twelve months at the time Act 455 was legislatively repealed and La. R.S. 11:416.1 was enacted, and therefore plaintiffs' rights under Act 455 never "vested" nor "accrued." The District Court agreed with the plaintiffs that La. R.S. 11:416.1 violated the Contract Clauses of the U.S. and Louisiana Constitutions. The Louisiana Supreme Court, however, reversed, finding "that plaintiffs had not met their burden under part one of the Contract Clause analysis that the statute impaired a contractual obligation . . . [T]he rights provided by Act 455, which was in effect when these plaintiffs retired and were rehired, effective June 30, 2001, were reemployment benefits which had neither vested or accrued when the law was changed by La. R.S. 11:416.1." *Smith v. Board of Trustees of Louisiana State Employees' Retirement System*, No. 2002-2161 (La. 06/27/03), 851 So. 2d 1100, 1110.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari to which this Opposition is being filed only raises the U.S. Constitutional Contract Clause issue under U.S. Constitution, Art. I, § 10. Plaintiffs set forth five reasons for granting a writ in this case. *See* Petition for Writ of Certiorari, at 10-18 (hereinafter "Writ"). The first reason offered by plaintiffs, the *Pennie v. Reis* decision, will be addressed in Section I below. The remaining four reasons are interrelated and will be addressed as one in Section II below.

I. The *Pennie v. Reis* Decision Has Been Ignored As A Precedent In Modern Public Retirement Benefit Cases And Was Not Relied Upon By The Louisiana Supreme Court Below

Plaintiffs point to this Court's 1889 decision in *Pennie v. Reis*, 132 U.S. 464 (1889) and suggest that the instant case affords an ideal opportunity to overrule that decision. *See* Writ, at 10-11. This is nothing more than a "straw man" raised by plaintiffs in hopes that it will entice this Court to accept this case.

The First Circuit Court of Appeals has recently stated that *Pennie v. Reis* "stands for the proposition that public employee pension programs do not create vested rights against legislative modifications, and thus are gratuities that a state may freely revoke." *Parker v. Wakelin*, 123 F.3d 1, 6 (1st Cir. 1997). However that court has also noted that "*Pennie* has . . . been ignored as precedent, perhaps because its dicta regarding public pension benefits arose in the context of a Due Process claim." *Id.* And, it further acknowledged that "the modern trend . . . is to protect pension benefits on the theory that a state's promise of

pension benefits represents an offer that can be accepted through the employee's performance – thus, a unilateral, implied-in-fact contract is created that is binding on the state." *Id. See also Transport Workers Union of America, Local 290 v. Southeastern Pennsylvania Transportation Authority*, 148 F.3d 619, 623 (3rd Cir. 1998) (same); and *McGrath v. Rhode Island Retirement Board*, 88 F.3d 12, 16-17 (1st Cir. 1996) (same).

While the First and Third Circuits expressly eschewed the "gratuities" approach of *Pennie v. Reis*, they nevertheless upheld legislative modifications to public retirement benefits against Contract Clause challenges. In *McGrath*, the First Circuit concluded that the state could make modifications, and even terminate a person's retirement benefits, without offending the Contract Clause unless the age and service requirements were met and the person had become vested. The Third Circuit arrived at the same result in *Transport Workers Union, Local 290*. Under the facts in *Parker*, the First Circuit went even further. It found that since there was no attempt to take away retirement benefits that were "currently payable" to existing retirees, regardless of whether "vesting" has occurred, there was no Contract Clause violation.

Pennie v. Reis has nothing to do with the *instant* case and should be rejected out of hand as a reason for granting a writ. The Louisiana Supreme Court did not even mention *Pennie v. Reis*. Instead, it relied upon a "vested rights" analysis similar to that conducted by the First and Third Circuits.

II. The Louisiana Supreme Court's Decision Is Consistent With The Most Recent Federal Circuit Decisions That Have Considered The Same Issue

To the extent plaintiffs "retired,"[2] they had to choose one of the payment options provided for in La. R.S. 11:446. This was obviously not important in their decision to "rehire" since at trial the plaintiffs who testified could not remember which option they picked or why they picked it. If they truly "retired" and are considered as being "retired," it follows that they must have begun accruing a new benefit as a new employee. The disconnect in plaintiffs' argument to the Louisiana Supreme Court was that because they "retired" while Act 455 was in effect, the potential benefits described in Act 455 (which only dealt with a *reemployed* retiree) were in some manner "accrued" or "vested." The Louisiana Supreme Court, in its decision below, declared that "a 'vested' right 'must be absolute, complete and unconditional, independent of a contingency, and a mere expectancy of a future benefit . . . does not constitute a vested right.' (citation omitted) Similarly, 'accrued' has been defined to mean 'in the sense of due and payable; vested,' *Black's Law Dictionary*, and '[the] day on which the creditor could institute his demand.'" 851 So. 2d at 1106.

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[2] Under La. R.S. 11:403(24) "'retirement' means termination of active service, with a retirement allowance granted under the provisions of this Chapter." Under La. R.S. 11:403(32) "'termination' means complete cessation of employment with the state." To consider what plaintiffs did in this case as "retirement" is to elevate form over substance since they never completely ceased employment with the state.

In fact, there is nothing in any law that plaintiffs can point to that establishes a right on behalf of a retiree to be reemployed or rehired once he or she retires. It is the state's perogative to reemploy a retiree, but if the retiree is reemployed, then La. R.S. 11:416 and 416.1 (after May 9, 2002) would control the relationship that the reemployed retiree has with the retirement system. What in fact occurred when these plaintiffs were reemployed is that they began accruing *new* and different potential future benefits as *new* employees. One of those potential future benefits was the opportunity to receive full retirement benefits after a twelve-month waiting period, and another potential benefit was the opportunity to earn a supplemental benefit after an additional thirty-six months of service. Prior to either of these benefits being "accrued" or "vested" by these plaintiffs, the legislature, exercising the authority given it by the Louisiana Constitution in Article X, § 29(E)(5), enacted legislation that altered these future benefits. Neither the twelve nor the thirty-six months had elapsed prior to Act 165 becoming effective on May 9, 2002.

The Louisiana Supreme Court recognized that the Louisiana Constitution, in Article X, § 29(B), states that membership in LASERS creates a contractual relationship, but then held:

> [T]he benefits offered by La. R.S. 11:416 are not retirement benefits, but reemployment benefits. Although these reemployment benefits include the right to certain retirement benefits along with a salary after reemployment for a certain period of time, they do not begin to accrue until a retiree becomes reemployed. Plaintiffs' rights to their retirement benefits under LASERS is [*sic*] not contested, it is their right to be reemployed

> and receive both their salary *and* their retirement benefits after 12 months of reemployment, and then their salary, retirement benefits, *and* supplemental benefits after 36 months of reemployment that is at issue. These plaintiffs simply had not fulfilled the necessary conditions of reemployment in order to be entitled to receive their salary along with their retirement benefits because they had not been reemployed for 12 months prior to the law being changed; similarly they had not been reemployed for 36 months which was a necessary condition to being able to also receive a supplemental benefit.
>
> * * *
>
> [W]e hold that reemployment benefits for retirees can be modified prior to the point when the retirees become eligible for those benefits. Because these rights have neither "vested" nor "accrued," there is no due process violation, or is there a violation of La. Const. Art. X, § 29(E)(5), by virtue of the enactment of La. R.S. 11:416.1. The statute does what the constitution allows, it alters "future benefit provisions of the state and statement public retirement systems."
>
> * * *
>
> As we have found that plaintiffs have not met their burden under part one of the Contract Clause analysis that the statute impairs a contractual obligation, our Contract Clause analysis is at an end.
>
> 851 So. 2d at 1107-08, 10.

"[T]here is no modern United States Supreme Court case that provides guidance as to the rights public employees have to their pensions." *Parker*, 123 F.3d at 8. But the

Louisiana Supreme Court's decision is consistent with the holding in all three Circuit cases cited in the previous section – the Third Circuit's decision in *Transport Workers Union, Local 290* (1998) and the First Circuit's decisions in *Parker* (1997) and *McGrath* (1996). These were all pension cases using The United States Supreme Court's four-part test for analyzing alleged impairment of contracts.

In the first of the cases, *McGrath*, the Rhode Island state retirement statute included a provision reserving the state's power to amend the terms of a member's participation. The Rhode Island legislature revised the method of calculating the minimum years of service before an employee of suitable age could retire. As a result, plaintiff brought a challenge under the Contract Clause. The First Circuit found no constitutional violation, stating:

> [U]nder the contract terms, a member's rights to a retirement annuity are not secure until he or she has met the age and service requirements (and, therefore, has become vested). Until such time, section 45-2147 permits the state to make modifications to, or even terminate, members' rights under the plan without offending the Contracts Clause.

88 F.3d at 20.

In *Parker*, legislative amendments to the Maine state retirement system affected the process by which one computed an employee's "average final compensation." This caused a reduction in the expected pension benefits of many of the members. A number of the plaintiffs had already satisfied the service requirements under the plan. In determining whether there was a Contract Clause violation, the court reviewed in some detail the differing

statutory rules for "vesting" of pension benefits throughout the various states, but noted that "we eschew[ ] participating in abstract contract theory in favor of performing a close analysis of the statutory provision at issue." 123 F.3d at 7. The court then focused on when "benefits are due," and concluded that there was "no unmistakable intent by the Maine legislature to create an enforceable private contract right against the modification of the plaintiffs' retirements benefits *until they are actually receivable*. . . . Thus, no violation of the Contract Clause may be found." *Id.* at 9 (Emphasis added).

In *Transport Workers, Local 290*, amendments to the Southeastern Pennsylvania Transportation Authority Retirement Plan for supervisory, administrative, and management employees required employee contributions, where previously none were required, without any increase in retirement benefits. In responding to plaintiffs' Contract Clause challenge, the Court concluded "that the Plan Amendment did not frustrate any legitimate expectations of the plaintiffs." *Id.* at 622. The court noted that:

> We have found no case . . . holding that an express reservation of a right to modify is ineffective with respect to employees who have *not* satisfied the plan requirements for retirement benefits. It necessarily follows that we have found no case holding that the rights of such employees under the Contract Clause were violated by an exercise of such an express reservation.

148 F.3d at 624 (emphasis supplied by court).

Article X, § 29(E)(5) of the Louisiana Constitution, provides that: "The *accrued* benefits of members of any state and statewide public retirement system shall not be

diminished or impaired. *Future benefit provisions . . . shall* only *be altered by legislative enactment.*" (Emphasis added). According to the Louisiana Supreme Court, this provision "allows [the legislature] to alter[ ] 'future benefit provisions of the state and statewide public retirement systems'" where "rights have neither 'vested' nor 'accrued'. . . . " 851 So.2d at 1108. Thus, the court found, in the language of *Transport Workers, Local 290* quoted above, "an express reservation of a right to modify," but in the instant case, in the State Constitution itself. The United States Supreme Court has stated "we 'accord respectful consideration and great weight to the views of the State's highest court. . . . " *General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992) (quoting *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938)). This should be doubly true where the State's highest court is interpreting its own State Constitution.

Plaintiffs claim that at least a dozen decisions of state courts of last resort differ with the Louisiana Supreme Court's decision here "on the important federal question presented." Writ, at 13. Five of the cases relied upon by plaintiffs involved plaintiffs who actually had met all of the eligibility requirements and thus had "vested rights" and/or in some cases were already retired and drawing retirement benefits when the legislation adversely modifying their benefits was passed. Those cases are: *Hickey* (Pa. 1954), *Moran* (Wisc. 1983), *Christensen* (Minn. 1983), *Bailey* (N.C. 1998), and *Nicholas* (Nev. 2000). Thus, these cases do not differ, and in fact, are consistent with, the Louisiana Supreme Court's decision in the instant case, and with the three federal Circuit cases discussed above. Another case, *Yeazell*, relied upon by plaintiffs for the proposition "that the right to a pension becomes vested

upon acceptance of employment," Writ at 15, was not decided under either the Arizona or U.S. Constitutions, but was decided under state contract law principles. Yet another case, *Birnbaum* (N.Y. 1958), Writ at 13, was decided solely under a state constitutional provision, New York Constitution, Art. V, § 7, without any discussion of the U.S. Constitution. The New York constitutional provision differed materially from the Louisiana constitutional provision, Article X, § 29(E)(5). The New York provision does not use the word "accrued" to modify the word "benefits" when it states that "the benefits . . . shall not be diminished or impaired," as does the Louisiana constitutional provision.

The remaining cases cited by plaintiffs dealt with individuals or class plaintiffs who had something akin to vested rights as the provisions being modified had been in place for significant periods of time and the plaintiff employees affected, in most cases, were close to meeting their eligibility requirements. These decisions appear to be based on the fact that the employees justifiably relied on the pension benefits at issue. None of these cases cited by plaintiffs involved a "form over substance" situation, like occurred in the instant case, i.e. "retiring" and then being immediately "reemployed" on the same or following work day. There was no justifiable reliance by plaintiffs on Act 455, in this case, but instead plaintiffs were seeking to take advantage of what appeared to be a loophole to "triple dip," by collecting full salary, full retirement benefits, and accrual of a further supplemental retirement benefit.

All of the cases cited by plaintiffs are distinguishable.

Based upon the rationale of the *Transport Workers, Local 290, Parker* and *McGrath* decisions, this Court is

respectfully urged to recognize, as found by the Louisiana Supreme Court, that there is no Contract Clause violation in the instant case, and is urged to reject plaintiffs' Writ application.

CONCLUSION

Considering the decision of the Louisiana Supreme Court on June 27, 2003, the record in this case, and the applicable law, defendant respectfully submits that the Louisiana Supreme Court's dismissal of plaintiffs' claims under the Contract Clause of the U.S. Constitution was correct, and therefore the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS E. BALHOFF
(Bar Roll No. 2716)
Counsel of Record
JUDITH R. ATKINSON
(Bar Roll No. 17240)
ROEDEL, PARSONS, KOCH, BLACHE,
BALHOFF & MCCOLLISTER
8440 Jefferson Highway, Suite 301
Baton Rouge, LA 70809-7652
Phone: (225) 929-7033
Fax: (225) 928-4925
Counsel for Respondent,
Board of Trustees for the
Louisiana State Employees'
Retirement System